NO. 92-707

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In the
Supreme Court of the United States

OCTOBER TERM, 1992

PETER E. DUFFY AND
NEW ENGLAND INSURANCE COMPANY
Petitioners

v.

FEDERAL DEPOSIT INSURANCE CORPORATION
as Manager of the FSLIC Resolution Fund substituted for
Federal Savings & Loan Insurance Corporation
Respondent

and

JOHN A. MMAHAT, MMAHAT & DUFFY AND
NEW ENGLAND INSURANCE COMPANY
Petitioner

v.

FEDERAL DEPOSIT INSURANCE CORPORATION
as Manager of the Federal Savings and Loan Insurance
Corporation Resolution Fund
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

HAMMETT & BAUS
JOHN V. BAUS, JR.*
200 Carondelet St., Suite 1600
New Orleans, LA 70130
(504) 569-0380

Attorneys for Petitioner
*Counsel of Record

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED

Over a year after a $35 million dollar judgment on one claim and settlement of all other claims in a massive suit wherein the FDIC, as receiver for a failed thrift, sued every conceivable defendant, the FDIC, after a later ruling of no insurance coverage, filed another suit against the law partner and the identical insurer of an attorney and law partnership against whom the FDIC previously obtained the judgment and a settlement. The Fifth Circuit's *de novo* review and reversal of the District Court's interpretation and enforcement of the settlement agreement, and its reversal of the District Court's dismissal of the second suit, which the District Court deemed filed in bad faith, present the following questions which merit review:

1. Whether, consistent with established principles of appellate review, the Court of Appeals may review *de novo* and reverse the Trial Court's factual findings and interpretation of an oral settlement agreement intended to end all litigation, which interpretation was properly based on the transcribed record of the agreement, extrinsic evidence of the parties' intent, and the Trial Court's presence for over two years during the proceedings, including the settlement discussions and transcription, at which he specifically questioned counsel as to their intent.

2. Whether, consistent with a Trial Court's inherent power and discretion to sanction litigants for bad faith conduct, a Court of Appeals may review *de novo* and reverse a Trial Court's dismissal of a suit which it deemed filed in bad faith.

3. Whether, consistent with the Trial Court's inherent power to control its own proceedings, and its discre-

tion to interpret and enforce a Pretrial Order, a Court of Appeal may review *de novo* and reverse a Trial Court's dismissal of claims and parties which were expressly required to be, but were not contained in the Pretrial Order.

4. Whether, consistent with established principles of res judicata and due process, a privy non-party to a previous judgment against his law partner and law firm, may be made defendant in a later suit based upon the exact transactions at issue in the first suit.

5. Whether, consistent with established principles of res judicata and due process, the law firm's insurer, which was dismissed for lack of coverage on the judgment, and was induced to settle the other claims in the suit by the FDIC's representations that there were no other remaining claims, may be made defendant in a later suit based on the same transactions at issue in the first suit.

6. If so, consistent with established principles of issue preclusion and due process, may such defendants be barred from relitigating the issues and asserting their separate defenses in the second suit.

RULE 14(b) STATEMENT

All parties in the Court of Appeals are listed in the caption. The following persons and entities were parties in the District Court proceedings, but are neither petitioners nor respondents herein:

Individuals	Organizations
James B. Cobb	American Casualty Co. of
Edward F. Corey	Reading, Pennsylvania
Frank D. Delery	Blitch Architects, Inc.
Albert Eason	Commonwealth Land Title
John R. Falgoust	Insurance Co.
Frank Fradella	Delery Appraisal Services, Inc.,
David Keith Gatto	Fidelity and Deposit Company
Richard W. Hare	of Maryland
William C. Hartwell	George Salvaggio Associates,Inc.
Richard Hudson	Federal Savings and Loan
Rodney P. Jordy	Insurance Corporation (FSLIC)
Robert L. Juneau	Frank Fradella Appraisal Services
Ronald E. Kilcrease	Gulf Builders, Inc.
Richard L. Landry, III	Langlois Foundations, Inc.
David Lichtenstein	Mmahat, Duffy, Opotowsky &
William F. Lucas	Walker
Augustine Lugo	Herbert P. Montalbano, Inc.
Robert L. Marrero	Richard C. Mouledous, PAC
Joseph C. Mmahat	Mount Hawley Insurance Co.
Herbert P. Montalbano	Continental Casualty Co.
Richard C. Mouledous	R.E.K. & Associates
Natchez Morice, Jr.	Richard W. Hare Construction
John T. Pender	William Hartwell & Associates
Algoth B. Paulsen	WYNAT Development Corp.
David M. Resha	WYNAT Development Co.
Paul E. Riviere	
George Salvaggio	
Eddie Vinet	
Elva N. Winters	
Jack Wyatt, II	

RULE 29.1 STATEMENT

The parent companies of New England Insurance Company, petitioner herein, are ITT Corp., ITT Hartford Insurance Group, Inc., Hartford Fire Insurance Co. and New England Reinsurance Corp. New England Insurance Company has no subsidiary companies to be listed.

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215 Pub.L. No. 101-73, 103 Stat. 252 4

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1992

NO.

DUFFY, et al, v. FDIC
MMAHAT, et al, v. FDIC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Peter E. Duffy and New England Insurance Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in these cases.

OPINIONS BELOW

The Opinion of the United States Fifth Circuit Court of Appeals (App. A, A-1) is reported at 960 F.2d 1325. The Opinion of the United States District Court for the Eastern District of Louisiana (App. D, A-21) is unreported.

JURISDICTION

The Opinion of the United States Fifth Circuit Court of Appeals was rendered on May 20, 1992. A timely petition for rehearing was denied on June 25, 1992 (App. E, A-54). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amendment 14
Fed. R. Civ. P. 16(e), 16(f), 19(a), 37(b), 52(a)
La. Civil Code arts. 2053, 2817, 3071, 3078, 3079, 3083
La. Code Civ. Pro. arts. 643, 737
(See Appendix F for Text)

STATEMENT OF THE CASE

On November 21, 1986, the same day Gulf Federal Savings Bank was placed into receivership, the FSLIC, as receiver, filed suits against myriad officers, directors, attorneys, architects, appraisers, builders, developers and insurers who had been involved with the bank, including John A. Mmahat ("Mmahat") (who was an attorney for and director of the bank), his law firm, Mmahat & Duffy, and their malpractice insurer, New England Insurance Company.[1] The suits were consolidated, and by the time the amended pleadings and third party complaints were filed, over 55 individuals and companies were named defendants.

During the course of proceedings prior to trial, all parties and the District Court were well aware that the FSLIC's suit was intended to encompass all conceivable claims against all conceivable defendants by Gulf Federal. In fact, the Complaint even contained an omnibus clause, putting at issue all activities at the bank. However, the FSLIC never named Peter E. Duffy ("Duffy"), Mmahat's law partner, as a party to the suit.

The comprehensive claims and issues in the suit were narrowed substantially throughout the course of lengthy discovery, and many claims were settled prior to trial. Then, pursuant to the District Court's Pretrial Notice, which required the FSLIC to list all claims, to identify all insureds of the defendant insurers, and to consider the nonjoinder of parties, the FSLIC submitted its Pretrial Order in October of 1988 limiting all of the bank's legal malpractice claims to four specific claims against only Mmahat, Mmahat & Duffy and New England Insurance Company. Duffy was not listed as an insured, the issue of his joinder was not raised by the FSLIC, and none of these claims in-

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[1] The jurisdiction of the District Court was premised upon 28 U.S.C. §§ 1331 and 1335, and 12 U.S.C. § 1819(b).

volved Duffy, or New England as Duffy's insurer.

Prior to trial, the claims against Mmahat, Mmahat & Duffy and New England were divided into two parts. Phase I included malpractice and breach of fiduciary duty claims based on the allegations that Mmahat advised Gulf Federal to make loans in violation of the "loans to one borrower" regulations of the Federal Home Loan Bank Board. Phase II included all remaining Gulf Federal malpractice claims, which were further limited by the FSLIC to three claims against Mmahat, Mmahat & Duffy and New England.

The Phase I claims were tried, and on December 9, 1988, the jury returned a verdict for $35 million dollars against Mmahat and Mmahat & Duffy. At this point, the issue whether New England's insurance policy provided coverage for the Phase I judgment still awaited determination by the District Court. Then, prior to such determination, the FSLIC agreed to a settlement of the remaining claims under Phase II, which the Court and all parties believed would resolve all other matters involving Gulf Federal.

On December 14, 1988, with all counsel present specifically in order to settle all of the remaining claims relating to Gulf Federal, the Court queried:

> THE COURT: As I understand it, generally what we have been referring to as the second phase of this case, which is the "traditional" malpractice claims, have been settled, is that correct?
>
> COUNSEL FOR FSLIC: That's correct.

Counsel for the FSLIC then dictated the initial terms of the settlement into the record. (See App. A-42-43) The Court then inquired of each Counsel in turn whether he had authority from his client to enter into the settlement, and all answered affirmatively. The Court then inquired:

> THE COURT: Does this settlement affect anybody else here? Mr. Ellis, you are a part of Mr. Simmons, correct?

MR. ELLIS: Mr. Duffy concurs.

THE COURT: Mr. Duffy concurs in settlement. Is anybody else affected by the settlement?

(No response from Counsel.)

THE COURT: All right, the Court will accept that.

Thereafter, still defining the settlement, the Court expressed its understanding of the remaining issues left to be decided in order to conclude the Gulf Federal case, including several insurance matters, Mmahat's dischargeability, and the apportionment of damages between Mmahat and the officers and directors of Gulf Federal. The Court asked each attorney to stand up, state his name, and state whether or not he concurred "that those are the only issues remaining in the case...." Counsel for the FSLIC stated: "I concur that those are the only remaining issues," and all other counsel agreed. Whereupon, as the Court Reporter noted, the "settlement with reference to phase 2 concluded." (App. D, A-52)

Two weeks later, on December 28, 1988, the Court ruled that the $35 Million dollar jury verdict on the Phase I claims was not covered under New England's malpractice policy under the dishonest and intentional acts exclusion. The FSLIC appealed, but the Fifth Circuit upheld the District Court's ruling in its opinion of August 3, 1990, and this Court declined review.[2]

When the time came to reduce the settlement between the parties to writing, the FDIC[3] only then began to claim that the settlement of Phase II did not dispose of all of its remaining claims, contrary to the spirit and letter of two years of litigation over every claim by Gulf Federal, the Pretrial Order, and the FDIC's express statements in

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[2] See *FDIC v Mmahat*, 907 F.2d 546 (5th Cir. 1990) *cert denied* ___U.S.___, 111 S.Ct. 1387, 113 L.Ed.2d 444 (1991).

[3] The FDIC became the real party in interest in these cases on August 9, 1989 pursuant to § 215 Pub.L. No. 101-73, 103 Stat. 252; 12 U.S.C. § 1821a. Accordingly, respondent is hereinafter referred to as FDIC.

the settlement conference transcribed in the record. Having lost its "deep pocket" by the Court's adverse ruling on the coverage issue, the FDIC, on November 3, 1989, almost a year after the settlement, filed a "Motion to Enforce Settlement Agreement," seeking to reserve its right to file another suit against Duffy and New England. Then, on November 14, 1989, the FDIC filed the above captioned second suit based on the same transactions as the first, naming Duffy and New England as defendants.[4]

The District Court, recognizing the FDIC's motives and its bad faith attempt to back out of a settlement which was clearly intended to put to rest all conceivable issues relating to Gulf Federal, Mmahat, Duffy and New England, denied the FDIC's Motion to Enforce Settlement (App. C, A-16), and *sua sponte* dismissed the *Duffy* case with prejudice (App. B, A-15), for the reasons expressed in its Order and Reasons for Judgment in *Mmahat.* (App. D, A-21).

Responding to the FDIC's argument that the settlement was only intended to resolve the three malpractice claims mentioned during the first part of the recorded settlement, the District Court emphatically disagreed, citing the pleadings, the Pretrial Order and the trial transcript of the settlement (set forth in full at App. D, A-41-52). It was the FDIC which decided which of all possible claims against Mmahat, Duffy, their firm and New England to pursue in its pleadings. It was the FDIC which limited itself in the Pretrial Order to the three specific malpractice claims in Phase II. And, it was the FDIC which clarified during the recorded settlement that the issues discussed, which did not encompass any issues regarding Duffy, were the only remaining claims and issues in the Gulf Federal litigation. Thus, the fact that the initial part of the record-

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[4] Duffy, however, filed for bankruptcy, and, without objection by the FDIC, was fully discharged from any claims in the instant suit on April 17, 1990. Accordingly, this second suit is truly a "second bite at the apple" for the FDIC against New England.

ed settlement listed only three claims was irrelevant—the FDIC expressly stated its intent that those were the only claims it had, and that no other issues remained.

Relying on one isolated passage in the transcript of the settlement that the FDIC would "reserve and maintain its rights under the jury verdict and any judgment to be rendered in its favor on 'Phase I'...", the FDIC argued in the alternative that, even if the settlement was intended to dispose of all other issues, it had reserved its rights to file a separate suit against Duffy and New England. The District Court disagreed, noting, as evidenced by the remainder of the trial transcript, not just this one out of context passage, that the quoted language of the settlement was meant only to preserve the FDIC's rights on appeal of the judgment under Phase I.

Further, as the District Court noted, Counsel for Duffy, who was present at all times during the settlement, never would have agreed to such a "settlement." And, as the Court stated: "it is also obvious that New England...would not have entered into this settlement if it had felt that it would be required to defend another action brought against itself and Duffy personally." (App. D, A-28) Nor, the Court noted, would it have approved such a "settlement":

> If it had been revealed to the Court that FSLIC intended to reserve any right with respect to any claim it might have against Peter Duffy or his insurer, the Court would never have entered a final judgment based on such. It is ludicrous to suggest that this Court, with all parties present and ready to proceed and after having cleared its docket to go forward with this case and considering all the pretrial work involved, would have agreed to enter a judgment amounting to a partial compromise. If FSLIC intended to preserve such a claim, good faith required it to have clearly stated such an intent to the Court....
>
> ...Not to have made such a statement and then to at-

> tempt to take advantage of some ambiguous language in a hastily proposed statement prepared by him for the record amounts to more than a failure to be candid....(App. D, A-28-29)

The Court noted that it was "obvious" why the FDIC was attempting to "exculpate itself from what everyone thought was a good faith agreement" by "microscopically" examining the transcript— the settlement was entered into before the Court's adverse ruling on coverage. (App. A, A-28) Finally, "[h]ad FSLIC intended to bring an additional claim against Peter Duffy, it had ample opportunity to do so over the two year course of this litigation and long prior to the Court's aforesaid adverse ruling on other issues and after a compromise agreement had been entered." (App. A, A-29)

The FDIC appealed this decision and the dismissal of its suit against Duffy and New England to the Fifth Circuit, which consolidated the appeals, and reversed and remanded the case in its decision rendered May 20, 1992. (App. A, A-1)

Without lending any deference to the Trial Judge's two years of experience with the massive Gulf Federal case, his presence during the settlement, at which he questioned the parties as to their intent, and the credibility determinations which only he could make, the Court of Appeals reviewed *de novo* and reversed the Trial Court's findings and inferences of fact, its interpretation and enforcement of the Settlement and the Pretrial Order, and its discretionary dismissal of the *Duffy* suit, which it had deemed in bad faith.

First, the Fifth Circuit, after reversing the Trial Court's determination that the oral settlement was ambiguous, applied a *de novo* standard to review the initial part of the settlement only, determined that it was limited to the specific claims therein, and held that it did not bar the *Duffy* suit. The Court also disregarded the Trial Court's interpretation of the FDIC's ambiguous reserva-

tion of rights to appeal the Phase I judgment, holding that the reservation of rights included the right to file a different suit against Duffy and New England.

Further, the Fifth Circuit completely disregarded the Trial Court's factual findings and credibility determinations that the parties intended to end all litigation. For example, regarding the fact that Counsel for Mr. Duffy was present at the settlement, and expressly stated that Mr. Duffy concurred in the settlement, the Court ruled on a cold record that the trial judge, who was present throughout two years of this litigation, "may have been misled" and "apparently misperceived the force of this statement" because counsel (who in fact represented both Mmahat and Duffy and so indicated on the record) did not expressly state that he represented Mr. Duffy's individual interests. The Fifth Circuit also essentially ignored the effect of the FDIC's express representation at settlement that no further issues remained as to New England, which was a party.

Next, despite the deference due to a Trial Court's interpretation and enforcement of a Pretrial Order, and again disregarding the fact that New England was a party to the prior suit, the Fifth Circuit erroneously ruled that the District Court's power under Fed. R. Civ. P. 16 to reject issues not contained in the Pretrial Order was irrelevant, because Duffy was not initially required to be joined as a party.

Finally, as for defendants' argument that principles of res judicata and due process barred a subsequent suit against Duffy, as a privy to the parties to the prior judgment and settlement, and New England, a party to the prior judgment and settlement, the Court erroneously held that claim preclusion could not apply to Duffy because the second suit did not rest on claims "identical" to those in the first suit between "identical" parties, and because relitigation would not be required. Ignoring the "transactional" test for and the policies behind res judicata, the Court found that the claims were not "identical." And, without addressing Duffy's status as a privy, the Court found that New England was not an "identical" party in

Duffy because the policy provided coverage for Duffy individually. Finally, without considering the principles of collateral estoppel and due process which permit Duffy and New England to relitigate and present their defenses, the Court stated that relitigation would not be required.

For the following reasons, this Court should grant petitioners' Petition for Writ of Certiorari, reverse the decision of the Fifth Circuit, and reinstate the decision of the District Court dismissing the suit against Duffy and New England.

REASONS FOR GRANTING THE PETITION

A. THE COURT OF APPEALS' REVERSAL OF THE DISTRICT COURT'S RULINGS INTERPRETING THE SETTLEMENT AGREEMENT, ENFORCING THE PRETRIAL ORDER, AND DISMISSING THE *DUFFY* SUIT VIOLATES ESTABLISHED PRINCIPLES OF APPELLATE REVIEW, AND ABROGATES THE INHERENT AND STATUTORY POWER OF A TRIAL COURT TO CONTROL ITS OWN PROCEEDINGS AND TO SANCTION LITIGANTS FOR BAD FAITH CONDUCT. THE APPELLATE DECISION CONFLICTS WITH DECISIONS OF THIS COURT AND THE OTHER CIRCUIT COURTS, AND SO FAR DEPARTS FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS AS TO MERIT REVIEW.

1. The Trial Court's factual findings, factual inferences and credibility determinations were not subject to *de novo* review or reversal.

The Trial Judge supported his dismissal of the *Duffy* suit with an express recital of factual findings, which were based on two years of presiding over and controlling the litigation, inferences from the recorded settlement and settlement conference, over which he presided, and credibility determinations which only he could make. The Fifth Circuit's *de novo* review and reversal of the Trial Court's factual findings demonstrates utter disregard of the Trial

Court's expertise and experience with the case, as well as principles of judicial efficiency. The decision further violates established standards of review adopted by this Court and the Circuit Courts of Appeals, meriting review by this Court.

a. The Fifth Circuit improperly failed to accord deference to the Trial Court's findings of fact and inferences from the evidence.

Fed R. Civ. P. 52(a) provides that: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given the opportunity of the trial court to judge of the credibility of the witnesses." This Court has pointed to the demands of judicial efficiency, the expertise developed by trial judges, and the importance of first hand observation as factors supporting the Rule. *Anderson v City of Bessemer City,* 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). Failure to lend the proper deference under the Rule is grounds for review and reversal. *See e.g., Anderson, supra; Icicle Seafoods, Inc. v Worthington,* 475 U.S. 709, 106 S.Ct. 1527, 89 L.Ed.2d 739 (1986).

This Court's enforcement of a deferential standard for review of findings of fact, including ultimate fact or inference, was clearly demonstrated in *Pullman-Standard v Swint,* 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982). In *Swint,* this Court stepped in to "preserve the...clearly erroneous rule against perceived evasion by the Fifth Circuit,"[5] and held that the District Court's ultimate factual finding of no intentional discrimination was reversible only if clearly erroneous. And, this Court later expressly confirmed that Rule 52(a) requires deference to factual determinations based on "physical or documentary evidence or inferences from other facts....Rule 52(a) **'does not make exceptions or purport to exclude certain**

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[5] See Childress, *"Clearly Erroneous": Judicial Review over District Courts in the Eighth Circuit and Beyond,* 51 Mo. L. Rev. 93, 94 (1986).

categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous.' " *Anderson,* 470 U.S., at 574, 105 S.Ct., at 1511 (emphasis added) *quoting Pullman Standard v Swint,* 456 U.S., at 287, 102 S.Ct., at 1789. *Accord,* 9 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2587 (2d ed. 1981).

Moreover, "[w]hen findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said." *Anderson,* 470 U.S., at 574, 105 S.Ct, at 1512, *citing Wainwright v Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985).

Accordingly, the Trial Court's factual findings and inferences in the instant case supporting dismissal of the *Duffy* suit, which were based not only upon the settlement, but also on two years of firsthand experience with the case and the parties, should have been accorded respect and deference.

b. The Fifth Circuit improperly failed to accord deference to the Trial Court's interpretation of the oral settlement agreement.

1. As a preliminary matter, petitioners take exception to the Fifth Circuit's conclusion that interpretation of an unambiguous oral settlement agreement is a question of law which may be determined *de novo.* Such a rule conflicts with the clear terms of Rule 52(a) and with this Court's holding that Rule 52(a) requires deference to **all** factual determinations, even those based on "physical or documentary evidence or inferences from other facts." *Anderson v. City of Bessemer,* 470 U.S., at 574, 105 S.Ct., at 1511-12; *Pullman Standard v Swint,* 456 U.S., at 287, 102 S.Ct., at 1789. Moreover, the rule conflicts with decisions in other circuits that the interpretation of contracts is a matter of

fact, not law, see, e.g., *Palmer v. Howard*, 493 F.2d 830 (10th Cir. 1974), and even with other decisions by the Fifth Circuit holding that inferences from the evidence, whether that evidence is oral or documentary, are subject to review only for clear error, see e.g. *United States v Texas Education Agency*, 647 F.2d 504, 506-07 (5th Cir. 1981) *cert denied* 454 U.S. 1143 (1982); *Stipelcovich v Sand Dollar Marine, Inc.*, 805 F.2d 599 (5th Cir. 1986); *Petition of Geisser*, 554 F.2d 698 (5th Cir. 1977); *Sicula Oceanica, S.A. v Wilmar Eng. & Sales Corp.* 413 F.2d 1332 (5th Cir. 1969).

Although the Fifth Circuit has retreated from the decision in later cases[6] and has distinguished it away in the instant case, in *Stipelcovich v Sand Dollar Marine*, the Fifth Circuit reviewed the Trial Court's findings relating to the construction of an oral settlement agreement entered on the record and a later written settlement under a clearly erroneous standard, correctly noting that in reviewing the findings, it was governed by Rule 52(a) "and the interpretation placed on the rule in *Anderson v Bessemer City...*" 805 F.2d, at 603.

The Fifth Circuit's attempt to distinguish that case on the basis that the Court was determining whether there was one settlement or two is simply invalid. The *Stipelcovich* Trial Court was called upon to factually interpret the terms of the two settlements and their effect, exactly as the Trial Court in the instant case was required to interpret the terms and effect of the single oral settlement. As correctly pointed out by Childress, *supra*, at n. 539, 540 and text: "Rule 52(a) is supposed to apply to factual inferences as well as credibility calls. And interpreting a contract from paper evidence in many cases looks like nothing more than drawing inferences from underlying facts." *Id.*,

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[6] *See e.g., LTV Educ. Systems Inc. v Bell*, 862 F.2d 1168, 1172 (5th Cir. 1989), holding, without discussing *Anderson* or *Stipelcovich*, that construction of an unambiguous release is a question of law for the court.

citing Illinois Central Ry. Co. v Gulf M. & O. Ry. Co., 308 F.2d 374 (5th Cir. 1962). As such, there is no valid justification for the Fifth Circuit's retreat from the rule: all findings of fact, based on any evidence, including unambiguous settlement agreements, must be accorded deference under Rule 52(a) and this Court's decision in *Anderson v City of Bessemer.* Accordingly, the Fifth Circuit's rule permitting *de novo* interpretation of unambiguous contracts should be reviewed and reversed.

2. Further, even assuming, (but not conceding) that the settlement is deemed unambiguous, the trial court properly considered extrinsic evidence under two well established exceptions to the parole evidence rule under Louisiana law, and its findings were therefore due deference. First, as the Louisiana Court succinctly explained in *Smith v Leger,* 439 So.2d 1203 (La. App. 1st Cir. 1983):

> Ordinarily the meaning and intent of the parties to a written contract (such as a written compromise agreement) must be sought within the four corners of the instrument and cannot be explained or contradicted by parole evidence. La. C.C. art. 2276; *Tauzin v Claitor,* 417 So.2d 1304 (La. App. 1st Cir. 1982) *writ denied* 422 So.2d 423 (La. 1982). **An exception to this rule exists when there is a dispute between the parties as to exactly what matters were intended to be settled by the compromise agreement.** La. C.C. art. 3079; *Moak v American Automobile Insurance Company,* 242 La. 160, 134 So.2d 911 (1961); *Munna v Mangano,* 404 So.2d 1008 (La. App. 4th Cir. 1981).

Smith v Leger, 439 So.2d, at 1206 (emphasis added.) See also *Trask v Lewis,* 258 So.2d 603, 604 (La. App. 1st Cir. 1972) noting that parole is always admissible to determine the intent of the parties to an agreement of compromise.

Second, another related exception to the parole evidence rule occurs when, as here, claims of res judicata by settlement or judgment are raised to defeat a second suit. As the Louisiana Supreme Court noted in *Perot's Estate v Perot,* 177 La. 640, 148 So. 903 (1933):

> Ordinarily, the pleadings in a former suit, when introduced in a second action, will show what was within the issues and determined in the first suit, **but it is a well settled general rule that extrinsic or parole evidence is admissable to show what was involved in the issues and settled by the judgment in a former action,** whenever the record leaves these facts in uncertainty.... (emphasis added.)

Perot's Estate v Perot, 177 La., at 643, 148 So., at 904.[7]

In the instant case, the parties were unable to reach agreement as to the terms of the settlement at issue for nearly a year after its confection. The FDIC, in filing its Motion to Enforce Settlement, squarely placed the intent of the parties as to the matters concluded at issue, and defendants have raised the settlement and the judgment as a bar to the second suit. Therefore, under the established exceptions to the parole evidence rule, which apply even to unambiguous contracts, the Trial Court properly considered extrinsic and parole evidence, and its findings and inferences should have been accorded deference by the Fifth Circuit.

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[7] Parole is also admissable, even with an unambiguous document, to prove vices of consent such as error, mistake or fraud, see *First Financial Bank, FSB v Austin,* 514 So.2d 281 (La. App. 5th Cir. 1987) *writ denied* 515 So.2d 1112 (La. 1987), to determine whether a written contract accurately represents a mutual agreement, *Austin,* 514 So.2d, at 282; *Valhi Inc. v Zapata Corp.,* 365 So.2d 867, 870 (La. App. 4th Cir. 1978), and to show that the writing does not express the true intent of the parties. *Valhi,* 365 So.2d, at 870; *Thieneman v Kahn,* 433 So.2d 761 (La. App. 5th Cir. 1983).

3. Finally, even assuming that the Court of Appeals' standard of review of an unambiguous oral agreement is upheld, and even without considering the exceptions to the parole evidence rule which permitted the Trial Court to consider extrinsic evidence, the Court of Appeals' *de novo* review was still improper. Under even Fifth Circuit standards, interpretation of an ambiguous agreement is an issue of fact subject to Rule 52(a) deference.[8] And, the oral settlement agreement at issue, and particularly the intended effect of that agreement as a bar to future litigation, was, as expressly held by the Trial Court, ambiguous.[9]

The oral settlement agreement consisted of the entire transcribed settlement proceedings, and not just the initial portion relied upon by the Fifth Circuit. The initial portion of the settlement listed three claims, the only remaining claims under Phase II, that were to be settled. However, in the latter portion of the settlement, during which the Court questioned the parties as to their intent, the FDIC and all other counsel indicated that the settlement was intended to dispose of all remaining claims relating to Gulf Federal. Further ambiguity was created by the fact that Peter Duffy, who was not a party to the suit, was represented at and concurred in the settlement. Finally, the contested provision regarding the FDIC's reservation of rights on appeal of the $35 million dollar judgment was entirely ambiguous. As such, the Trial Court's interpretation of the agreement, which required consideration of extrinsic evidence, should

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[8] See e.g. *In Re Raymark Indus, Inc.*, 831 F.2d 550, 553 (5th Cir. 1987); *Carpenters Amended and Restated Health Benefit Fund v Holleman Construction Co., Inc.*, 751 F.2d 763 (5th Cir. 1985) *citing West v Smith*, 101 U.S. 263, 270, 11 Otto 263, 270, 25 L.Ed. 809, 812 (1879).

[9] Note that under Louisiana law, a decision whether a contract is ambiguous or unambiguous is a question of fact, which cannot be disturbed absent manifest error. *G/O Enterprises v Mid Louisiana Gas Co.*, 444 So.2d 1279 (La. App. 4th Cir. 1984) *writ denied* 446 So.2d 318 (La. 1984).

have been accorded deference.

3. The Trial Court's interpretation and enforcement of the Pretrial Order was not subject to *de novo* review or reversal.

Under Fed. R. Civ. P. 16(e), each party "has an affirmative duty to allege at the pretrial conference all factual and legal bases upon which the party wishes to litigate the case." *Trinity Carton Co., Inc. v Falstaff Brewing Corp.*, 767 F.2d 184, 193 n.13 (5th Cir. 1985) *cert denied* 475 U.S. 1017 (1986). Then, "once entered, a pretrial order governs the trial." *Hall v State Farm Fire and Casualty Co.*, 937 F.2d 210, 212 (5th Cir. 1991); *Morris v Homco Int'l, Inc.*, 853 F.2d 337, 342 (5th Cir. 1988). An attempt to pursue an issue not contained in the pretrial order may be rejected by the Trial Court at its discretion. *Flannery v Carroll*, 676 F.2d 126, 129-30 (5th Cir. 1982). "An issue or theory not even implicitly included in the pretrial order **is barred unless the order is later amended** 'to prevent manifest injustice.' " *Hall*, 937 F.2d, at 212, quoting *Morris v Homco*, 853 F.2d, at 343. (emphasis added)[10]

The Courts of Appeals will review a trial court's interpretation of a pretrial order only for abuse of discretion. *Hall v State Farm*, 937 F.2d, at 212; *Swift v State Farm Mutual Auto Insurance Co.*, 796 F.2d 120, 122 (5th Cir. 1986). "We are not inclined to disturb the ...[trial] court's interpretation of a stipulation agreed upon by the parties during pretrial proceedings and approved by the court." *Hall v State Farm*, 937 F.2d, at 213, *quoting Hodges v United States*, 597 F.2d 1014, 1017 (5th Cir. 1979). See also

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[10] Note that amendments or objections to the pretrial order are required, absent which the litigant is barred from raising the matter on appeal. *Trinity Carton Co.*, 767 F.2d at 193 n.13. And, (even though no amendments were requested in the instant case) such amendments are properly refused where "the evidence and the issues were known at the time of the original pretrial conference." *Id.* The FDIC knew of Duffy's availability and status from the very inception of the initial suit.

Veranda Beach Club Ltd. Partnership v Western Sur. Co., 936 F.2d 1364 (1st Cir. 1991); *R.L. Clark Drilling Contractors, Inc. v Schramm, Inc.*, 835 F.2d 1306, 1308 (10th Cir. 1987); *ACORN v City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986). Accordingly, the Court of Appeals clearly erred in failing to lend deference to the District Court's interpretation of the Pretrial Order, which was one of the factual bases for its ruling.

4. The non-joinder of Duffy in the initial suit does not justify the Court of Appeals' lack of deference

The only justification the Court of Appeals provided for its failure to lend deference to the Trial Court's interpretation and enforcement of the Pretrial Order was that Duffy allegedly was not required to be joined in the suit, and therefore the Pretrial Order should have no effect. The Fifth Circuit's decision on joinder is clearly incorrect and unreasoned, conflicts with the Federal Rules and decisions in the majority of circuits, and ignores Louisiana law.

As a preliminary matter, the Court of Appeals' erroneous conclusion was based on the misapprehension that partners in Louisiana, as in most common law states, are **jointly and severally** liable. However, in Louisiana, partners are only **jointly** liable. See La. Civ. Code art. 2817 ("A partnership as principal obligor is primarily liable for its debts. A partner is bound for his virile share of the debts of the partnership, but may plead discussion of the partnership."); Litvinoff, *Obligations*, § 7.23, at 140-142 (1974); *Moore v LeBlanc*, 430 So.2d 339 (La. App. 3d Cir. 1983); *Cortiza v Rosenblat*, 291 So.2d 425 (La. App. 4th Cir. 1974). Under federal law relating to joinder of parties who are jointly liable, Duffy's joinder was required.

Fed. R. Civ. P. Rule 19 provides generally that a person **shall** be joined as a party if, in his absence the parties cannot be accorded complete relief, or the disposition of the action may impair the interested person's ability to protect

his interests, or leave any persons already parties subject to the risk of multiple or inconsistent obligations. As the comments to the rule note, where tortfeasors with "joint and several" liability are involved, their joinder is merely permissive. **However, those with joint liability must all be joined as parties in order to obtain complete relief.** See Restatement (Second) of Judgments, section 60, at pp. 107, 115-116 (1982).[11] This federal rule most definitely applies to partners of a partnership. See 7 C. Wright, A. Miller & Kane, *Federal Practice and Procedure,* sec. 1613, at 195 (2d ed. 1986) (Where partners' liability is joint, as opposed to joint and several, all partners are theoretically indispensable parties, and must be joined as defendants).[12]

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[11] See also *Bracktin Tie, Lumber & Chip. Co., Inc. v McLarty Farms Inc.*, 704 F.2d 585, 587 (11th Cir. 1983)(Joint obligors should be joined as necessary parties in order to obtain complete determination of controversy); *United States v Elfer,* 246 F.2d 941 (9th Cir. 1957)(suit dismissed for failure to join husband as joint obligor in suit against wife for repayment of joint obligation); *Cunard Line, Ltd. v Abney,* 540 F. Supp. 657 (S.D.N.Y. 1982)(Joint obligors are necessary parties in an action against one or more joint obligors); *Miller v Camarco Contractors,* 11 F.R.D. 560 (D.C.N.Y. 1951) (All joint obligors are necessary parties); *Fredstrom v Giroux Post, No. 11 of American Legion,* 94 F. Supp. 983, 985 (W.D. Mich. 1951) (Joint obligors are indispensable parties); *Schram v Perkins,* 38 F. Supp. 404, 407 (E.D. Mich. 1941) (Joint obligors are indispensable parties). *Cf. Harrell & Sumner Contracting Co. v Peabody Petersen Co.,* 546 F.2d 1227 (5th Cir. 1977); *Bry-Man's Inc. v Stute,* 312 F.2d 585 (5th Cir. 1963) (Joint obligees are indispensable parties in action to enforce obligation).

[12] See also *Delta Financial Corporation v Paul D. Comanduras & Associates,* 1992 WL 197831, No. 90-3194 (4th Cir. August 18, 1992) (Noting general rule that in suits between partners over partnership assets and obligations, all partners are necessary parties); *Marcella v ARP Films, Inc.,* 778 F.2d 112 (2d Cir. 1985) (Dismissing counterclaims by ARP for failure to join indispensable parties including plaintiff's partners); *Envirotech Corp. v Bethlehem Steel Corp.,* 98 F.R.D. 250 (D.C.N.Y. 1983) *aff'd* 729 F.2d 70 (2d Cir. 1984) (Partner was indispensable party to counterclaim by party against another partner); *Sitchenko v Diresta,* 512 F. Supp. 758 (E.D.N.Y. 1981) (Corporate partners

Louisiana law as well expressly requires the joinder of all joint obligors in La. Code Civ. Pro. Art 643: "All joint obligees are necessary parties to an action to enforce a joint right, and all joint obligors are necessary parties to an action to enforce a joint obligation." See also Litvinoff, *Obligations, supra*, § 7.23: "...enforcement of [joint obligations] may not be demanded from the joint obligors, or by the joint obligees, separately for the portion of each, **but the multiple obligors or obligees of the joint obligation must be joined in the action.**" *Id.*, at p. 141 (emphasis added). See also *Hebert v Brugier*, 582 So.2d 838, 842 (La.1991)(on rehearing) in which the Louisiana Supreme Court remanded a case for a new trial, to include a determination whether the defendant's partner was an indispensable party to the suit against her; *Roy v Gravel*, 570 So.2d 1175, 1182 (La. App. 3d Cir. 1990) noting that the three partners of a partnership prior to its dissolution were indispensable parties; *Cambre v St. Paul Fire and Marine Ins. Co.*, 331 So.2d 585, 590-91 (La. App. 1st Cir. 1976) *writ denied* 334 So.2d 434 (La. 1976), noting that the former partners of a dissolved partnership were joint obligors and necessary parties. *Cf. Foster v Stewart*, 161 So.2d 334, 337 (La. App. 1st Cir 1964), holding that partnership was an indispensable party to partner's action on lease, and remanding for new trial based on non-joinder.[13] Accordingly, under Louisiana as well as federal law, Duffy was an in-

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ordered joined in suit against partnership, since complete relief could not be afforded without joinder of all partners).

[13] The Court of Appeals' reliance on one Louisiana case that held that joinder of the partnership is unneccesary when the partners are later sued, *Koppers Co. v Mackie Roofing and Sheet Metal Works*, 544 So.2d 25, 26 (La. App. 4th Cir. 1989) was entirely misplaced. In *Koppers*, the partners were seeking to join the **partnership** in a second suit against **all partners**, after the plaintiffs had obtained a prior judgment against the partnership. (Note that it is the partners who are jointly liable between themselves, they are not joint obligors with the partnership, which is primarily liable. See La. C.C. art. 2817, *supra*). *The Koppers* court discussed later joinder of the partnership, and also decided that the

dispensable or necessary party to a suit against his partner.

Finally, the Court of Appeals, in discussing the joinder issue, overlooked or ignored the fact that New England was a party to the suit. The FDIC was required, pursuant to the Pretrial Notice, to list all claims against New England, as well as all insureds of New England against whom it was asserting claims in the Pretrial Order, and failed to list Duffy or the claims against him. As such, the FDIC's failure to comply also bars it from suit against New England under the Trial Court's valid enforcement of the Pretrial Order. Thus, there was no basis for *de novo* review of the Trial Court's interpretation and enforcement of the Pretrial Order, warranting review.

4. The Trial Court's dismissal of the *Duffy* suit was within its statutory and inherent power to sanction, and should not have been reversed.

The District Court's decision to dismiss the second suit was also justified under its statutory authority to sanction the FDIC for failure to comply with the Pretrial Order, and under its inherent power to sanction the FDIC for bad faith conduct.

First, Fed. R. Civ. P. 16(f) permits the imposition of sanctions, including dismissal, upon parties who fail to comply with, or who endeavor to subvert, pretrial orders. As with the interpretation of Pretrial Orders, the District Court's imposition of sanctions for non-compliance with those and other orders is subject to review only for abuse of discretion. See *National Hockey League v Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.

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partners need not be named in the initial suit against the partnership (which is primarily, not jointly liable for the partnership's debts). However, *Koppers* did not address and does not apply in the instant situation, where one, but not all, of the joint obligor partners was named. In that instance, the rest of the partners, as joint obligors, must all be joined.

2d 747 (1976) in which this Court affirmed a District Court's dismissal of the petitioner's complaint for failure to timely answer interrogatories, noting that: "The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing." 437 U.S., at 642, 96 S.Ct. , at 2780, *citing* C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2284, p. 765 (1970); *General Dynamics Corp. v Selb Mfg. Co.*, 481 F.2d 1204, 1211 (8th Cir. 1973); *Baker v F & F Investment*, 470 F.2d 778, 781 (2d Cir. 1972) *cert denied* 411 U.S. 966 (1973). See also *Cooter & Gell v Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) (Holding that all aspects of District Court's imposition of sanctions for non-compliance with Rule 11, including factual and legal issues, are reviewed for abuse of discretion); *Chambers v NASCO, Inc.*, ____U.S.____, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)(Holding that lower court's imposition of sanctions under its inherent power is reviewed for abuse of discretion).

Second, in addition to statutory authority, the District Court also had the inherent power to sanction the FDIC for its bad faith conduct and misrepresentations to the court and parties by dismissing the second suit. The District Court specifically found that the FDIC, in failing to include the new claims in the Pretrial Order or to mention them at the settlement, was not in good faith, and that its actions amounted to "more than a failure to be candid..."(App. D, A-27-29).

In *Chambers v NASCO, Inc.*, ____U.S.____, 111 S.Ct. 2123, 115 L.Ed. 2d 27 (1991), this Court explored the limits of the lower courts' inherent power to sanction litigants for bad faith conduct. In that case, the District Court invoked its inherent power to assess as a sanction for a party's bad faith conduct over a million dollars in attorney's fees and expenses. In affirming the award, this Court noted that outright dismissal of a lawsuit as a sanction for bad faith

conduct was as well within the Court's inherent power. *Chambers v NASCO,* 111 S.Ct., at 2133, citing *Roadway Express, Inc. v Piper,* 447 U.S. 752, 765, 100 S.Ct. 2455, 2463, 65 L.Ed.2d 488 (1980) (Affirming dismissal and award of attorney's fees for litigant's failure to comply with discovery); *Link v Wabash R. Co.,* 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (Affirming dismissal for failure to attend pretrial conference).[14] This Court further noted that a court may sanction a party for abuses occurring outside of the courtroom. *Chambers v NASCO,* 111 S.Ct., at 2139. Accordingly, the court must certainly have the power to impose sanctions where conduct within the courtroom in one suit convinces the court that a second suit was filed in bad faith.

Considering the course and scope of the two year litigation by the FDIC over every conceivable claim against every conceivable defendant, the FDIC's narrowing of such claims throughout the course of the proceedings, the FDIC's failure to include the additional claims against Duffy and New England in the Pretrial Order, the FDIC's representations to the Court and to New England that all claims relating to Gulf Federal, Mmahat, Duffy and New England were being settled, and the court's later release of New England from liability under the policy (the obvious reason the FDIC filed the second suit), the court was justified in concluding that the FDIC was in bad faith. As such, the District Court's dismissal of the suit,

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[14] The Fifth Circuit as well has expressly recognized the District Courts' inherent and statutory powers to dismiss a suit. In *Callip v Harris County Child Welfare Dept.,* 757 F.2d 1513 (5th Cir. 1985), the Fifth Circuit affirmed the District Court's dismissal of a suit for failure of the plaintiff to file a joint pre-trial order, noting that: "One of the sanctions authorized by Rule 16(f), by reference to Rule 37, is dismissal of the case. This rule merely makes explicit a discretionary power to control the expeditious disposition of docketed cases that appellate courts have long recognized to be **an inherent attribute of federal district courts.**" 757 F.2d at 1517, *citing Link v. Wabash R. Co.,* 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962).

which should only have been reviewed for abuse of discretion, should not have been reversed.

B. THE COURT OF APPEALS' REVERSAL OF THE DISTRICT COURT'S DETERMINATION THAT THE PRIOR SETTLEMENT AND JUDGMENT BARRED THE *DUFFY* SUIT WAS IMPROPER UNDER ESTABLISHED PRINCIPLES OF RES JUDICATA, DUE PROCESS, AND COLLATERAL ESTOPPEL. THE APPELLATE DECISION CONFLICTS WITH THE CONSTITUTION, DECISIONS OF THIS COURT AND DECISIONS OF THE CIRCUIT COURTS OF APPEALS, MERITING REVIEW BY THIS COURT.

The Court of Appeals' disposition of the res judicata issue in this case, particularly as to defendant New England, violates this Court's rulings, the Fifth Circuit's own previous rulings, and demonstrates a conflict between the Circuits. Further, the Court's holding that Duffy is bound by a prior judgment to which he was not a party and in which he did not have a chance to present his own defenses, and its intimations that Duffy and New England cannot relitigate the issues therein, demonstrates an extreme departure from constitutional requisites of due process, meriting review.

1. Under the transactional test for res judicata, the claims against Duffy and New England were barred by the FDIC's failure to raise them in the first suit and by the settlement.

Under the doctrine of res judicata, or claim preclusion, a final judgment on the merits of an action precludes the relitigation of issues that were or could have been raised in the prior action against parties or their privies. See *Allen v McCurry,* 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980); *Nevada v United States,* 463 U.S. 110, 103 S.Ct.

2906, 77 L.Ed.2d 509 (1983); *Federated Dept. Stores, Inc. v Moitie,* 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). Res judicata prevents litigation of all grounds for recovery that were previously available or determined in the prior proceeding. *Brown v Felsen,* 442 U.S. 127, 131, 99 S.Ct. 2205, 2209, 60 L.Ed.2d 767 (1979).[15] The plaintiff "is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail." *Stark v Starr,* 94 U.S. 477, 485, 24 L.Ed. 276 (1876).

This Court in *Nevada* approved the use of the tests set forth in both the Restatement and Restatement (Second) of Judgments to identify whether claims or causes of action are the same. *Nevada,* 103 S.Ct., at 2918-19, n.12. Under the "transactional" test in the Restatement (Second), whether causes of action arise from the same transaction "is to be determined by 'giving weight to such considerations as whether the facts are related in time, space, origin or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.'" *Nevada v United States,* 103 S.Ct., at 2919 n.12, *citing* Restatement (Second) of Judgments § 24 (1982).[16]

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[15] Accord, *Kale v Combined Ins. Co. of America,* 924 F.2d 1161, 1164 (1st Cir. 1991) *cert denied* 112 S.Ct. 69 (1991); *Matter of Howe,* 913 F.2d 1138, 1144 (5th Cir. 1990); *Nilsen v City of Moss Point,* 701 F.2d 556, 562 (5th Cir. 1983) (*in banc*); *Lovely v Laliberte,* 498 F.2d 1261, 1263 (1st Cir.) *cert denied* 419 U.S. 1038 (1974).

[16] Most of the Courts of Appeals, including the Fifth Circuit, have adopted the transactional test set forth in the Restatement (Second) of Judgments. See, *e.g. Matter of Howe,* 913 F.2d 1138, 1144 (5th Cir.1990); *Vitaline Corp. v General Mills, Inc.,* 891 F.2d 273, 275 (Fed. Cir. 1989); *Murphy v Jones,* 877 F.2d 682, 684 (8th Cir. 1989); *Dowd v Society of St. Columbans,* 861 F.2d 761, 763 (1st Cir. 1988); *Gregory v Chehi,* 843 F.2d 111, 117 (3d Cir. 1988); *Petromanagement Corp. v Acme-Thomas Joint Venture,* 835 F.2d 1329, 1335 (10th Cir. 1988); *Harnett v Billman,* 800 F.2d 1308, 1312 (4th Cir. 1986) *cert denied* 480

The dispositive issues in determining whether suits involve the same "claim" are not the relief requested or the theory asserted, "but whether the plaintiff bases the two actions on the same nucleus of operative facts." *Matter of Howe,* 913 F.2d, at 1144; *City Bank, N.A. v Data Lease Financial Corp.,* 904 F.2d 1498, 1503 (11th Cir. 1990) *cert denied* 484 U.S. 1062 (1988); *Ruple v City of Vermillion,* 714 F.2d 860, 861 (8th Cir. 1983) *cert denied* 465 U.S. 1029 (1984). "The rule is that res judicata 'bars all claims that were or *could have been* advanced...' " *Id., quoting Nilsen,* 701 F.2d, at 560 (emphasis in original). "[T]he same action for res judicata purposes includes 'all the remedial rights of the plaintiff against the defendant growing out of the relevant transaction (or series of connected transactions).' " *Id.,* at n.10.

Unbelievably, in rendering its decision in the instant case, the Fifth Circuit ignored controlling decisions of this Court, and even its own transactional test. The entirely different standard the Fifth Circuit announced was whether such claims rested on "identical obligations" and required relitigation of "identical issues" between "identical parties"! *Mmahat,* 960 F.2d, at 1329, citing *Kaspar Wire Works, Inc. v Leco Engineering & Mach., Inc.,* 575 F.2d 530 (5th Cir. 1978). *Kaspar* concerned a dismissal under the Declaratory Judgments Act, which provides different standards for res judicata. Moreover, many cases, including cases which the Fifth Circuit has held barred by res judicata, did not involve relitigation of "identical issues," and were not based upon "identical obligations." These cases were deemed barred because the obligations arose out of the same nucleus of facts or transaction, and because the plaintiff essentially slept on his rights to bring the claim

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Footnote 16 continued.

U.S. 932 (1987); *Nilsen v City of Moss Point,* 701 F.2d 556, 562 (5th Cir. 1983) (*in banc*).

in the initial suit.[17]

Moreover, as the Fifth Circuit itself has stated, res judicata bars claims which could have been raised against those related by employment, agency, or vicarious liability to the prior defendant—the parties need not be "identical":

> Where a plaintiff has sued parties in serial litigation over the same transaction; where plaintiff chose the original forum and had the opportunity to raise all its claims relating to the disputed transaction in the first action; **where there was a "special relationship" between the defendants in each action, if not complete identity of the parties**; and where although the prior action was concluded, the plaintiff's later suit continued to seek essentially similar relief— the courts have denied the plaintiff a second bite at the apple. [citations omitted]

Lubrizol, 871 F.2d, at 1288. (emphasis added)

Other Circuits concur. In *Lowell Staats Min. Co. v Philadelphia Electric Co.*, 878 F.2d 1271 (10th Cir. 1989), the plaintiff, who was unable to collect on a judgment he obtained against a corporation, filed another suit against an individual who was an employee of another company which had been named in the original action as a third party defendant, seeking to hold him liable for the judgment. Finding that the employee was a privy, and that

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[17] See e.g., *Durhan v Neopolitan*, 875 F.2d 91, 94 (7th Cir. 1989) (Prior suit for replevin barred later civil rights claims); *Browning v Navarro*, 887 F.2d 553, 558 (5th Cir. 1989) (civil rights suit barred fraudulent judgment suit); *Manego v Orleans Board of Trade*, 773 F.2d 1 (1st Cir. 1985) *cert denied* 475 U.S. 1084 (1986) (prior civil rights claims barred later antitrust claim); *Jackson v U.S. Postal Service*, 799 F.2d 1018 (5th Cir. 1986) (ejection suit barred claims for back rent); *Poe v John Deere Co.*, 695 F.2d 1103 (8th Cir. 1982) (prior employment discrimination claim barred later tort claims); *Lubrizol Corp. v Exxon Corp*, 871 F.2d 1279, 1287 (5th Cir. 1989) (settlement barred all related claims).

plaintiff could have asserted any claims against the employee in the original action, the court affirmed the dismissal.[18]

Moreover, the Fifth Circuit entirely failed to consider the effect of the settlement as res judicata. Under the principles of res judicata, a settlement receives the same effect as a final judgment. *See In re Medomak Canning,* 922 F.2d 895 (1st Cir. 1990); *Nemaizer v Baker,* 793 F.2d 58 (2d Cir. 1986); *Lubrizol Corp. v Exxon Corp., supra; City Bank, N.A. v Data Lease Financial Corp., supra. See also* La. C.C. art 3078 (settlements have the authority of a thing adjudged). And, where a plaintiff intends by settlement, as in the instant case, to resolve all claims relating to a transaction, the settlement is res judicata as to all claims which he **could have** asserted. As the Fifth Circuit itself stated in *Lubrizol*: "If it is clear that the parties agreed to settle claims that were not reflected in the original pleadings, preclusion may extend to claims that were not even formally presented." *Lubrizol,* 871 F.2d at 1287, n.12, *quoting* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure,* § 4443 at 386-87 (1981). See also *In re Medomak, supra,* (settlement was res judicata as to interested parties who were not named, where plaintiff intended to settle all claims related to the transaction).

Under the prevailing res judicata standards, the *Duffy* suit should be barred. The settlement, in which Duffy expressly concurred, was clearly intended to apply to him, and to dispose of all other Gulf Federal claims. As for the

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[18] As for the privity determination, which the Fifth Circuit did not address, it is clear that Duffy was a privy to Mmahat and Mmahat & Duffy. There is no strict test, privity simply requires a close enough identity of interests. See, e.g. *Lowell Staats Mining Co., Inc., supra,* (Employee of corporation held a privy of corporation); *City Bank, N.A. v Data Lease Financial corp. supra,* (Those secondarily liable are privies); *In re Medomak Canning,* 922 F.2d 895 (1st. Cir. 1990); *Sports Factory Inc. v Chanoff,* 586 F. Supp. 342 (E.D.Pa. 1984) (Partner held privy of partnership). And, New England was an actual party.

judgment, the Fifth Circuit expressly noted that the *Mmahat* and *Duffy* suits "both arise from Mmahat's activities as general counsel" of Gulf Federal, fulfilling the transactional test. Considering the policy behind the doctrine, to encourage litigants to raise all claims arising out of a single transaction in order to prevent needless litigation, the claims against Duffy, should have been set forth in the initial suit.

2. Under established principles of Due Process and Collateral Estoppel, the Judgment in the first suit cannot conclude Duffy or New England.

The Fifth Circuit's dictum that relitigation would not be required was in error. In the event that the doctrine of claim preclusion does not prevent the second suit against Duffy and New England, basic principles of collateral estoppel (issue preclusion) and due process require that Duffy and New England be permitted to relitigate all issues, and to present their separate claims and defenses.

First, Duffy and New England will raise issues and defenses which were not litigated in the initial suit, which they had no opportunity or reason to present.[19] And, it is blackletter law that: "the rules of issue preclusion do not purport to prohibit litigation of matters that never have been argued or decided." Wright, Miller & Cooper, *Federal Practice and Procedure,* § 4416, p.113 (Supp. 1992). *See also* Restatement (Second) of Judgments § 27.

Second, Duffy and New England will be required, and are entitled, to relitigate even issues which were

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[19] Such issues and defenses include, without limitation, the defenses that Mmahat's dishonest acts were not within the mandate of the partnership and that Mmahat's acts were attributable to his role as director for the bank, not as attorney. Other issues include the apportionment of damages between Mmahat and others who settled, and whether the FDIC, as receiver of the bank to which the directors' acts are attributable, may recover from an innocent partner under the doctrine of *in pari delicto.* Additional coverage issues, including potential non-coverage for dishonesty on Duffy's part, will also be raised by the insurer.

litigated in the first suit, since Duffy did not participate in or control the defense. See *U.S. v Mendoza*, 464 U.S. 154 (1984) (Issue preclusion can only preclude the same party, or a party which had the ability to control the defense); *American Casualty Co. v United Southern Bank*, 950 F.2d 250 (5th Cir. 1992). *See also* Wright, Miller and Cooper, *supra:* "In any further litigation against partners to enforce individual liability, the plaintiff is precluded from relitigating any issues resolved by the first judgment, **but the new defendant partners are not precluded.**" *Id.*, § 4460, p.533. As such, Duffy and New England cannot be prevented from relitigating any issues in the first suit or from presenting their defenses.

Further, if enforced, any such prohibition would clearly violate the requisites of due process. The Restatement (Second) of Judgments recognizes the general rule "that a judgment in an action upon a partnership obligation does not impose personal liability on a partner who neither was served with process nor participated in the defense of the action." Under the requisites of due process, a judgment is only "binding upon unserved partners to the extent of the partnership's property...." *Id.*, § 60, at pp 114 - 117.[20] In *Detrio v United States*, 264 F.2d 658 (5th Cir. 1959), the Fifth Circuit itself noted that: "...in partnership law the establishment of the personal unlimited liability of the general partner requires a legal proceeding in which (whether local practice requires him to be named personally or not) the individual partner thus pursued is per-

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[20] Although the Fifth Circuit cited this exact section of the Restatement (Second) for the proposition that successive suits against partners who are jointly and severally liable are sometimes permitted, the Court neglected to point out that the initial judgment cannot be binding on the new defendant partners under the requisites of due process. This apparent discrepancy was explained by the court in *Sports Factory Inc. v Chanoff*, 586 F.Supp. 342 (E.D. Pa. 1984), noting that state procedural rules permitting successive actions cannot alter the substantive law of partnerships or res judicata. *Id.*, at 348.

sonally served with process or notice." *Detrio,* 264 F.2d, at 661. "**Undoubtedly the partnership law that requires personal service on a partner to bind his individual assets is required by concepts of procedural due process.**" *Id.*[21]

Accordingly, the Fifth Circuit's statement that relitigation will not be required also mandates review and reversal.

CONCLUSION

Peter E. Duffy and New England Insurance Company's Petition for a Writ of Certiorari should be granted.

HAMMETT & BAUS
JOHN V. BAUS, JR.*
200 Carondelet St., Suite 1600
New Orleans, LA 70130
(504) 569-0380
Attorneys for Petitioner
*Counsel of Record

September 22, 1992

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[21] *Accord, In re Petroleum Corp. of America,* 417 F.2d 929, 935 (8th Cir. 1969) (one who holds judgment against partnership may levy against partnership property, but not property of an individual partner not personally served in the action); *Hastings-Murtagh v Texas Air Corp.,* 119 F.R.D. 450 (S.D. Fla. 1988) (application of judgment to non-party would violate due process); *In re Alexander Grant & Co. Litigation,* 110 F.R.D. 528 (S.D. Fla. 1986) (individual partners in a partnership must be before the court to permit plaintiffs access to their personal assets); *In re Panitz & Co.,* 270 F.Supp. 448 (D.C. Md.) *aff'd sub nom Hammerman v Arlington Federal Savings & Loan Ass'n,* 385 F.2d 835 (4th Cir 1967); *International Shoe Co. v Hawkinson,* 73 N.D. 677, 18 N.W.2d 761 (1945); *American Photo Player Co. v Simon,* 92 So. 307 (La. 1922) (partner not served or named is not concluded by judgment against another partner); *Cortiza v Rosenblat,* 291 So.2d 425 (La. App. 4th Cir. 1974) (service on one partner does not permit personal judgment against absent partner); Annot., 100 A.L.R. 997, 999 (1936).

APPENDIX A

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Manager of the FSLIC Resolution
Fund Substituted for Federal Savings & Loan
Insurance Corporation,
Plaintifff-Appellant,

v.

JOHN A. MMAHAT, ET AL.,
Defendants-Appellees.
FEDERAL DEPOSIT INSURANCE CORPORATION,
as Manager of the Federal Savings & Loan
Insurance Corporation Resolution Fund,
Plaintiff-Appellant,

v.

PETER E. DUFFY and NEW ENGLAND
INSURANCE COMPANY,
Defendants-Appellees.

Nos. 90-3123, 90-3130

United States Court of Appeals,
Fifth Circuit.

May 20, 1992

Before KING, DAVIS and JOHNSON, Circuit Judges.

KING, Circuit Judge:

The Federal Deposit Insurance Corporation (FDIC) appeals the dismissal with prejudice of its suit against Peter E. Duffy, a former partner in the law firm of Mmahat

& Duffy, and New England Insurance Company, Duffy's malpractice insurance carrier (*Duffy*). It also appeals from part of the district court's denial of the Federal Savings & Loan Insurance Corporation's (FSLIC's) motion to enforce the oral settlement agreement entered into in its suit against Duffy's former partner, John Mmahat, and Mmahat & Duffy (*Mmahat*). The district court concluded that the terms of the *Mmahat* settlement agreement, and the pretrial order in that suit, barred the subsequent action against Duffy. Finding that the district court erred both in its interpretation of the *Mmahat* settlement agreement and the legal effect of the *Mmahat* pretrial order on the *Duffy* suit, we reverse the *Mmahat* judgment in part, vacate the dismissal of *Duffy,* and remand *Duffy* for trial.

I. BACKGROUND

The *Mmahat* and *Duffy* suits both arise from Mmahat's activities as general counsel of the now-defunct Gulf Federal Savings Bank (Gulf Federal) performed during the tenure of his partnership at the law firm of Mmahat & Duffy (M & D). After Gulf Federal was placed in receivership in 1986, the FSLIC, as receiver, brought various claims against Gulf Federal's former management and others, including an action against Mmahat and M & D. The FSLIC did not name Duffy as a defendant in any of these claims.

In an effort to simplify the trial, the *Mmahat* case was divided into two parts. Phase I included the suit against M & D and Mmahat individually, and New England Insurance Company (New England), their professional liability insurer,[1] for legal malpractice and breach of fiduciary duty. The professional malpractice action rested on the claim that Mmahat had repeatedly advised Gulf

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[1] Suit against New England was brought pursuant to the Louisiana direct action statute, La.Rev.Stat.Ann. § 22:655. This provision gives the plaintiff the right to pursue a cause of action against the wrongdoer

Federal to make loans in violation of the "loans-to-one-borrower" restrictions of the Federal Home Loan Bank Board.[2] Phase II consisted of malpractice claims relating to three loan transactions in which Mmahat made defective title examinations and other errors. The Phase I case culminated in a jury verdict for $35 million against Mmahat and M & D.

*1327 After the verdict was returned, but before the district court determined whether the partnership's insurance policy covered the verdict, counsel announced a settlement on the *Mmahat* Phase II claims. Counsel for the FSLIC dictated the terms of the settlement into the record. The settlement covered the Phase II claims for malpractice. The parties also reserved their rights and defenses in connection with the jury verdict and any judgments rendered in the Phase I claim. New England specifically reserved its right to contest both coverage and policy limitations on both phases of the lawsuit and how payments of the Phase II settlement would be credited against the policy limitations. The FSLIC reserved the right to oppose. When these terms were recorded, the district court asked all attorneys present whether they had their client's authority to enter into the settlement. They responded that they did. The district court then asked if the settlement affected anyone else. Michael Ellis, co-counsel for Mmahat and M & D, announced that Duffy concurred.

In response to the district court's request, the parties listed the following issues as requiring resolution to

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(footnote 1 continued)

directly against the wrongdoer's insurer. *See Trahan v. Liberty Mutual Ins. Co.*, 314 So.2d 350, 354 & n. 6 (La.1975).

[2] For a more detailed discussion of this cause of action, see *FDIC v. Mmahat*, 907 F.2d 546, 549 (5th Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1387, 113 L.Ed.2d 444 (1986).

conclude the case: (1) whether Mmahat and New England had any claim against American Casualty Insurance Company; (2) whether the policy exclusions of New England precluded it from liability for payment of the Phase I judgment; (3) whether Mmahat was entitled to discharge in bankruptcy; and (4) the apportionment of damages between the officers and directors of Gulf Federal and Mmahat and M & D.

After the parties reached this settlement on the Phase II claims, the district court ruled that the New England policy did not cover any of the judgment against Mmahat and M & D because it excluded coverage for "dishonesty." The FSLIC appealed this ruling.[3] While the appeal was pending, the parties tried unsuccessfully to reduce their settlement to writing. On November 3, 1988, the FSLIC filed a motion to enforce the *Mmahat* oral settlement agreement. On November 14, 1988, the FSLIC filed suit against Duffy and New England, contending that Duffy, as a 40% partner in M & D at all relevant times, was liable under Louisiana law for his virile share of the $35 million judgment against the partnership rendered in Phase I.[4] In opposition, New England argued that because the FSLIC failed to reserve its claims against Duffy or New England as his insurer, the FSLIC had settled and released those claims under the agreement. The district court agreed. It denied the FSLIC's motion and sua sponte dismissed the *Duffy* complaint with prejudice.

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[3] Mmahat and M & D also appealed the jury's liability verdict. On appeal, we sustained the jury verdict and affirmed the district court's ruling on the coverage issue. *FDIC v. Mmahat*, 907 F.2d 546 (5th Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1387, 113 L.Ed.2d 444 (1991).

[4] Because Duffy was in bankruptcy, the suit also alleged that New England, as Duffy's insurer, was responsible for his liability up to the $2 million policy limit.

Specifically, the district court based its decision on the following grounds: (1) The FSLIC failed to include potential claims against Duffy in the *Mmahat* pretrial order; (2) the settlement of Phase II in *Mmahat* implicitly included relinquishment of all malpractice claims remaining after litigation of Phase I, including any against Duffy; (3) the reservation of rights announced during the settlement served only to preserve both parties' appeal rights from the jury verdict in Phase I; (4) neither party mentioned any claim against Duffy when the district court requested a listing of unresolved claims; and (5) since the FSLIC was the party who dictated the terms of the settlement offer into the record, any ambiguity, if it exists, should be construed against the FSLIC. The FDIC[5] appealed both rulings. We *1328 granted the FDIC's motion to consolidate these appeals. The FDIC contends that the district court erred in (1) concluding that the FDIC waived its claim against Duffy and New England by failing to include the issue in the *Mmahat* pleadings or pretrial agreement; and (2) interpreting the scope of the December 14, 1988 *Mmahat* settlement agreement. We address these issues in turn.

II. ANALYSIS

[1] The parties disagree as to the appropriate standard to review oral settlement agreements. New England

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[5] As noted above, the FSLIC instituted proceedings in *Mmahat*. Congress abolished the FSLIC effective August 9, 1989. Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) § 401, Pub.L. No. 101-73, 103 Stat. 183, 354 (1989); see 12 U.S.C. § 1437 note. Under FIRREA, FSLIC's assets, including the instant claims, were transferred to the FSLIC Resolution Fund. The FDIC, as manager of this fund, is now the real party in interest pursuing this appeal. See FIRREA § 215, 103 Stat. 252; 12 U.S.C. § 1821a. In the remainder of our discussion, we will refer solely to the FDIC as the appellant in these consolidated actions.

maintains that *Stipelcovich v. Sand Dollar Marine, Inc.*, 805 F.2d 599, 603 (5th Cir.1986), instructs us to review a court's interpretation of an oral settlement agreement under the clearly erroneous standard. We do not believe *Stipelcovich* applies directly to the case at bar. *See Id.* (applying clearly erroneous standard to discern whether oral agreement entered into record and written settlement agreement constituted one agreement or two separate settlements). Unlike *Stipelcovich*, the issue here involves the interpretation of settlement terms. When the terms of the settlement are clearly specified in the record, as they are in this case, we find it appropriate to use the de novo standard we apply to review written contracts. See *LTV Educ. Systems, Inc. v. Bell*, 862 F.2d 1168, 1172 (5th Cir.1989) ("where the parties' intentions can be ascertained from the unambiguous language of the instrument, construction of the release is a question of law for the court.") (citing *Weingart v. Allen & O'Hara*, 654 F.2d 1096, 1103 (5th Cir.1981)). *Compare In re Raymark Indus., Inc.*, 831 F.2d 550, 553 (5th Cir.1987) (applying clearly erroneous standard to determine terms of ambiguous oral settlement agreement because "[t]he court did not specify the terms of the settlement it was approving, nor did the parties seek such clarification at that time").

[2] The FDIC contests the soundness of the district court's rationale in dismissing its claim against *Duffy*. The district court first reasoned that the FDIC was precluded from proceeding against *Duffy* individually because it did not name *Duffy* as a defendant or include a claim against *Duffy* in the *Mmahat* pretrial order. We agree with the FDIC that the district court erred in determining that the FDIC's failure to include *Duffy* as a party to *Mmahat* or mention him in the *Mmahat* pretrial order barred the suit against him.

[3] Federal Rule of Civil Procedure 16 governs the scope and course of a trial. A court may properly reject an

attempt to pursue an issue not contained in the pretrial order unless its consideration is necessary to prevent manifest injustice. *Trinity Carton Co. v. Falstaff Brewing Corp.*, 767 F.2d 184, 192 n. 13 (5th Cir.1985), *cert. denied*, 475 U.S. 1017, 106 S.Ct. 1202, 89 L.Ed.2d 315 (1986). However, this rule does not establish whether an individual must be joined as a *party* to an action.[6] We therefore consider whether the FDIC's failure to join Duffy as a defendant in the *Mmahat* suit prevented it from bringing the subsequent *Duffy* suit.

[4] Neither federal nor Louisiana law requires the joinder of all partners in an action against a partnership. See 7 Charles A. Wright, Arthur Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1623 (2d ed. 1986) (joinder unnecessary for partners who are jointly and severally liable); *Koppers Co. v. Mackie Roofing & Sheet Metal Works*, 544 So.2d 25, 26 (La.App.1989) (The purpose of La.Code Civ.P. art. 737 is not to "make it mandatory that the partners be named as defendants every time a partnership is sued"; rather, its purpose is to require a partnership creditor *1329 first to "exhaust his rights against the partnership before he proceeds against the individual partners.");[7] *cf. Cone Mills Corp. v. Hurdle*,

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[6] Federal Rule of Civil Procedure 19 specifies the criteria for determining who is a necessary or indispensable party to a suit. Although the district court did not expressly conclude that Duffy was an indispensable party to the *Mmahat* suit, its decision to dismiss the *Duffy* suit with prejudice suggests that joinder of Duffy was required for just adjudication, *i.e.*, so that his interests would not be adversely affected by the judgment. See Fed.R.Civ.P. 19.

[7] In *Koppers*, the plaintiff initially sued the partnership on a contract debt and obtained a judgment against the partnership. A Louisiana court of appeals reversed the trial court's dismissal of a subsequent action seeking judgment against the individual partners for their virile shares. The appellate court reasoned:

> [p]rior to filing the instant suit, Koppers had already obtained a judgment against the partnership. Their present suit seeks redress

369 F.Supp. 426, 438 (N.D.Miss.1974) (because general partners are jointly and severally liable for their partnership obligations under Mississippi law, one or more partners may be sued on a partnership obligation without joining all partners in the suit). *See generally Restatement (Second) of Judgments* § 60 (1982) (a successful lawsuit against one partner does not bar subsequent lawsuits against other partners individually on the same debt); 7 *Federal Practice and Procedure* § 1613, at 196 n. 32 (noting that Official Comment to the Uniform Partnership Act § 15 recognizes that under some state partnership laws, "the partnership may be sued in the partnership name, and thereafter the partners separately until satisfaction is had"). Under the Louisiana law of partnerships, each partner is secondarily liable for his virile share of the partnership debts. See La.Civ.Code Art. 2817.[8] The fact that Duffy might have been joined in *Mmahat* does not preclude the FDIC from enforcing the *Mmahat* judgment against Duffy in a separate action. Since the *Mmahat* Phase I litigation resulted in a $35 million judgment against Mmahat and M & D, the FDIC is entitled to seek Duffy's share of the liability for that judgment.

(footnote 7 continued)

> against the individual partners for their virile share of the partnership debt. Although, as a practical matter, it may have been more economical and expedient to have joined the partners in the first suit, the intent of the law has been satisfied that recovery was first sought against the primary debtor, the partnership.

Koppers, 544 So.2d at 26.

[8] This provision states:

> A partnership as principal obligor is primarily liable for its debts. A partner is bound for his virile share of the debts of the partnership but may plead discussion of the partnership.

La.Civ.Code Art. 2817. The number of members in a partnership, not the extent of each member's interest, defines the virile share. *See Duncan v. Gill*, 227 So.2d 376, 382 (La.App.1969).

[5] New England also contends that the *Duffy* claim is barred because it arose from the same transaction as *Mmahat* and was brought against an individual in privity with the parties in *Mmahat.* Basically, New England contends that res judicata required that Duffy be joined as a defendant in *Mmahat* or that he not be sued at all. This contention is based on the application of the doctrine of claim preclusion, which "treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same 'claim' or 'cause of action.' " *Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc.,* 575 F.2d 530, 535 (5th Cir.1978) (citations omitted). In *Kaspar,* we also observed that "[t]he aim of claim preclusion is ... to avoid multiple suits on identical entitlements or obligations between the same parties, accompanied, as they would be, by the redetermination of identical issues of duty and breach." *Id.*

[6] *Duffy* does not rest on an identical obligation, nor does it require readjudication of the malpractice claim. *Mmahat* was based on the malpractice of Mmahat, committed as a partner of the firm. In contrast, *Duffy* is based on the pre-existing $35 million judgment against Mmahat and M & D and Duffy's virile share of liability for that debt pursuant to Louisiana Civil Code Article 2817. Thus, the FDIC did not pursue a new theory of recovery in *Duffy*; it sought merely to collect a pre-existing judgment in its favor.[9] Ob-

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[9] For this reason, *Sports Factory, Inc. v. Chanoff,* 586 F.Supp. 342 (E.D.Pa.1984), does not support New England's argument. *Sports Factory* did not involve an action to collect on a judgment. Rather, in *Sports Factory,* the district court held that Pa.R.Civ.P. 2134(a) did not permit the plaintiff to bring new claims against a partner who was not individually named as a defendant in a prior action against the partnership. The court noted that the purpose of the rule was "to allow a plaintiff who has obtained a judgment against a partnership sued in firm name only, to recover against individual partners who were not individually named as defendants to a suit against the firm, to the extent

viously, res judicata *1330 would bar *Duffy* if the FSLIC had lost in *Mmahat* because the FDIC would be seeking to relitigate the issue of liability. However, res judicata does not bar the FDIC's suit against Duffy to collect the judgment it obtained against the firm.[10] *See Restatement (Second) of Judgments* § 60 (1982).

[7] The FDIC also argues that the district court erroneously interpreted the oral settlement agreement as discharging the FDIC's claims against Duffy for his virile share of liability in the judgment against M & D. It also challenges the district court's finding that the agreement reserved the FDIC's rights for appeal purposes only. The FDIC maintains that the parties intended the *Mmahat* settlement to release Mmahat, M & D, and New England from liability only in connection with the three specific claims enumerated during the Phase II settlement conference, and reserve the FDIC's rights to enforce the Phase I jury verdict in its favor.

The district court found that the Phase II settlement agreement covered not only the specific claims listed by the parties, but "all matters involved in the case other than those specifically set forth in 'Phase I.' " However, when he dictated the oral settlement agreement into the record,

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(footnote 9 continued)

that the judgment against the firm is unsatisfied." *Id.* at 348. Consequently, *Sports Factory* harmonizes with the result we arrive at here.

[10] The fact that New England is the active party to the suit does not affect our analysis here. As Duffy's insurer, New England stands in Duffy's shoes. *Ex parte Tokio Marine & Fire Ins. Co.*, 322 F.2d 113, 116 (5th Cir.1963). An insurer may not rely on res judicata principles to avoid liability if the suit against the insured in whose shoes the insurer stands would not be barred by res judicata. Since res judicata does not bar the suit against Duffy, it does not bar the collection effort against New England as his insurer. New England is not an identical party in *Duffy* because the insurance policy provides separate coverage for Duffy as a partner of M & D.

counsel for the FSLIC described the terms of the settlement as follows:

> The settlement of phase 2 of the litigation [, which] consists of FSLIC's claims against Mmahat & Duffy and New England for malpractice in connection with 1) title opinions issued by Mmahat & Duffy on the John Em's [sic] loan, 2) the special warranty deed prepared in connection with the sale of the Chateau Legrand project and 3) the lack of title examination on the Segura loan [,] consisting of the following terms in connection with that settlement: The FSLIC will settle and grant releases to John Mmahat, Mmahat & Duffy and New England *for the preceding claims* in return for payment of, total amount of $250,000, which is made up of $225,000 from New England and $25,000 from the third party defendant that [was] brought into the action by New England, that third party defendant being Continental Land Title Insurance Company.

(Emphasis added). This enumeration of the claims to be settled clearly confines the agreement to those claims.[11]

The FDIC maintains that during the settlement conference, the FSLIC expressed no intention to release Duffy from any liability he might have for the *Mmahat* Phase I judgment. The district court found that the agreement failed to preserve the FDIC's right to proceed against Duffy and New England as his insurer because,

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[11] The district court also looked to the attorney's listing of unresolved issues to find that the agreement included all remaining matters except those litigated in Phase I. Because Duffy was not a party, a claim against him cannot properly be described as a remaining issue in the *Mmahat* suit. The FSLIC would have had to explicitly waive any potential claim against Duffy during the settlement conference to have this effect.

> had FSLIC attempted to reserve any rights against these parties, neither counsel for Duffy nor counsel for New England, both of whom were present at this ... settlement, would have concurred in such a settlement. Yet, both parties were specifically asked if they concurred in the agreement and both responded affirmatively.

The record lacks the factual basis for this reasoning. No attorney appearing before the court during the settlement conference identified himself as representing Duffy. The district court may have been misled when it inquired whether the settlement affected anyone else present. An attorney who identified himself as representing *1331 Mmahat and M & D responded, "Mr. Duffy concurs." However, the district court apparently misperceived the force of this statement. First, counsel never identified himself as representing Duffy's individual interests, nor does the record show that Duffy himself was present at the settlement conference. Second, the record contains no evidence that counsel for M & D or New England had the authority to settle any claims brought against Duffy individually.[12]

Furthermore, counsel for the FSLIC further stated that "the FSLIC will reserve and maintain its rights under the jury verdict and any judgment to be rendered in its favor on phase I which consists, of course, of the claims for malpractice and breach of fiduciary duty in connection

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[12] The New England insurance policy prevented both the insurer and the insured from settling without the written consent of the other. The contract covering Mmahat & Duffy and its partners specifies that

> [t]he Insured may effect settlement of any claim ... with the written consent on the Company, such consent not to be unreasonably withheld. The Insured shall not, except at personal cost, ... settle any such claim in the absence of such consent....
>
> The Company may, with the written consent of the Insured, make any settlement or compromise of any claim which it deems expedient....

with the loan-to-one borrower violations." This general reservation of rights necessarily includes the right to enforce these judgments as well as the right to appeal from them.

In finding that the FSLIC released its right to pursue the claim against Duffy, the district court relied on the fact that the FSLIC failed to list collection of the Phase I judgment from Duffy as an unresolved issue during the settlement conference. As we observed above, because Duffy was not a party to the *Mmahat* litigation, the FDIC need not have mentioned a potential claim against him as an unresolved issue in *Mmahat*. In addition, the FDIC noted during the settlement conference that insurance policy coverage issues remained unresolved. Accordingly, we conclude that the district court erred in finding that the FDIC released all claims against Duffy in the *Mmahat* settlement agreement.[13] The FDIC's reservation preserved its right to file suit against Duffy and New England in an effort to collect Duffy's virile share of the $35 million judgment in *Mmahat*.

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[13] The FDIC also requests reversal of the portion of the district court's judgment in *Mmahat* that orders the FSLIC to "defend, indemnify, and hold harmless John A. Mmahat, Mmahat & Duffy and New England as to all 'Phase I' claims which FSLIC may have against these parties, including any and all claims against Peter Duffy and/or against New England as his insurer...." The transcript of the settlement agreement indicates that the FSLIC offered to indemnify only Continental Casualty Insurance Company from any claims against remaining defendants to the *Mmahat* litigation. Since the record lacks any indication that the FSLIC intended to indemnify other parties, we conclude that this order rests on a factually erroneous finding.

III. CONCLUSION

For the foregoing reasons, we REVERSE that part of the district court's judgment in *Mmahat* which orders the FDIC to release any claims against Duffy and New England as his insurer and requires the FDIC to indemnify Duffy and New England as Duffy's insurer. Also, we VACATE the district court's dismissal with prejudice of *Duffy* and REMAND that case for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
DEC 20 88

FEDERAL DEPOSIT INSURANCE CORP., etc.	CIVIL ACTION
VERSUS	No. 89-4947
PETER DUFFY ET AL	SECTION "A"

ORDER OF DISMISSAL

Considering the Court's written Order and Reasons entered herein in Civil Action No. 86-5160, accordingly;

IT IS ORDERED, that the above captioned matter be and it is hereby dismissed with prejudice.

New Orleans, Louisiana, this 19th day of December, 1989.

/s/ Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY **DEC 20 1989**

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
DEC 19 89

FEDERAL SAVINGS AND LOAN INSURANCE COMPANY, ETC.	CIVIL ACTION
VERSUS	No. 86-5160
JOHN A. MMAHAT, ET AL.	SECTION "A"

JUDGMENT

Pursuant to the settlement agreement which was entered into and put on the record in this matter on December 14, 1988, and in accordance with the Court's authority as set forth in Federal Rule of Civil Procedure 70;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

(1) That John A. Mmahat, Mmahat & Duffy, and New England Insurance Company ("New England"), and all persons or entities for whom they may be responsible or who may be responsible for them, are **RELEASED AND DISCHARGED** of and from all "Phase II" claims or legal malpractice claims which Federal Savings and Loan Insurance Company ("FSLIC") may have against these parties, including any and all claims against Peter Duffy and/or against New England as his insurer.

DATE OF ENTRY **DEC 19 1989**

(2) That Commonwealth Land Title Insurance Company ("Commonwealth") and all persons or entities for whom it may be responsible or who may be responsible to it, are **RELEASED AND DISCHARGED** of and from all claims arising out of or relating to the "Phase II" Chateau LeGrand claim.

(3) Commonwealth and all persons or entities for whom it may be responsible or who may be responsible for it, are **RELEASED AND DISCHARGED** of and from all claims arising out of or relating to the third-party claim made by New England against Commonwealth for all or part of the relief claimed by FSLIC against New England with regard to the "Phase II" Chateau LeGrand claim.

(4) There is **RESERVED** to FSLIC all rights, claims, and demands that it has or may have against John A. Mmahat, Mmahat & Duffy and New England concerning those issues presently on appeal or cross-appeal from "Phase I," including this Court's Judgment of December 28, 1988.

(5) There is **RESERVED** to FSLIC all rights, claims, and demands that it has or may have against New England regarding the extent to which, if any, the settlement payment shall be credited to New England so as to reduce any recovery awarded by any court to FSLIC against New England arising out of the "Phase I" $35 million judgment.

(6) There is **RESERVED** to New England all rights or defenses that it has or may have against FSLIC, John A. Mmahat and/or Mmahat & Duffy in defense of FSLIC's "Phase I" claims.

(7) There is **RESERVED** to New England all rights

or defenses that it has or may have against FSLIC, John A. Mmahat and/or Mmahat & Duffy regarding the extent to which, if any, the settlement payment shall be credited to New England so as to reduce any recovery awarded by any court in favor of FSLIC against New England arising out of the "Phase I" $35 million judgment.

(8) There is **RESERVED** to New England all rights or defenses that it has or may have against FSLIC, John A. Mmahat and/or Mmahat & Duffy concerning those issues presently on appeal or cross-appeal from "Phase I," including this Court's Judgment of December 28, 1988.

(9) There is **RESERVED** to John A. Mmahat and Mmahat & Duffy all rights or defenses that they have or may have against FSLIC or New England for costs of defense and for indemnity of claims for alleged legal malpractice and professional liability insurance coverage of John A. Mmahat and Mmahat & Duffy arising out of FSLIC's "Phase I" claims.

(10) There is **RESERVED** to John A. Mmahat and Mmahat & Duffy all rights or defenses that they have or may have against FSLIC or New England concerning those issues presently on appeal or cross-appeal from "Phase I," including this Court's Judgment of December 28, 1988.

(11) FSLIC shall **DEFEND, INDEMNIFY, AND HOLD HARMLESS** John A. Mmahat, Mmahat & Duffy and New England as to all "Phase II" claims or legal malpractice claims which FSLIC may have against these parties, including any and all claims against Peter Duffy and/or against New England as his insurer, whether said claims are asserted directly or indirectly by way of indemnity, contribution, intervention or otherwise, by, through or on behalf of FSLIC, or its subrogees, indemnities,

assignees or creditors including all attorneys' fees, costs, penalties, damages or expenses incurred in connection with the defense to any such claim as well as any settlement, judgment, liability or other relief of any nature arising from such claim.

(12) FSLIC shall **DEFEND, INDEMNIFY AND HOLD HARMLESS** Commonwealth as to all claims arising out of or relating to the "Phase II" Chateau LeGrand claim, whether said claims are asserted directly or indirectly by way of indemnity, contribution, intervention or otherwise, by, through or on behalf of FSLIC, or its subrogees, indemnities, assignees or creditors including all attorneys' fees, costs, penalties, damages or expenses incurred in connection with the defense to any such claim as well as any settlement, judgment, liability or other relief of any nature arising from such claim.

(13) John A. Mmahat, Mmahat & Duffy and New England shall **DEFEND, INDEMNIFY AND HOLD HARMLESS** Commonwealth as to all claims arising out of or relating to the third-party claim made by New England against Commonwealth for all or part of the relief claimed by FSLIC against New England with regard to the "Phase II" Chateau LeGrand claim, whether said claims are asserted directly or indirectly by way of indemnity, contribution, intervention or otherwise, by, through or on behalf of FSLIC, or its subrogees, indemnities, assignees or creditors including all attorneys' fees, costs, penalties, damages or expenses incurred in connection with the defense to any such claim as well as any settlement, judgment, liability or other relief of any nature arising from such claim.

(14) In consideration of the aforesaid, FSLIC shall **ACCEPT** New England's tendered check in the amount of

$225,000.00 as full payment of New England's portion of the settlement heretofore agreed to or forthwith **RETURN** said check to New England and New England may consummate this settlement by depositing the sum of $225,000.00 in the Registry of this Court.

(15) In consideration of the aforesaid, FSLIC shall **ACCEPT** Commonwealth's tendered check in the amount of $25,000.00 as full payment of Commonwealth's portion of the settlement heretofore agreed to or forthwith **RETURN** said check to Commonwealth and Commonwealth may consummate this settlement by depositing the sum of $25,000.00 in the Registry of the Court.

New Orleans, Louisiana, this 19th day of December, 1989.

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

BY: /s/ Denny P. Descant
DENNY P. DESCANT
CHIEF DEPUTY CLERK

APPROVED:

/s/ Charles Schwartz, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

FILED
DEC 19 89

FEDERAL SAVINGS AND LOAN INSURANCE COMPANY, ETC.	CIVIL ACTION
VERSUS	No. 86-5160
JOHN A. MMAHAT, ET AL.	SECTION "A"

ORDER & REASONS

This matter is before the Court on the motion of plaintiff Federal Savings and Loan Insurance Corporation ("FSLIC")[1] to enforce a settlement which was entered and put on the record on December 14, 1988. The parties have been unable to execute a final settlement agreement as a result of a dispute regarding what claims were settled by this December 14, 1988 agreement. FSLIC claims that only three specific malpractice claims against defendants John A. Mmahat ("Mmahat"), Mmahat & Duffy and New England Insurance Company ("New England") were settled, leaving open the opportunity for FSLIC to bring other such claims against defendants. FSLIC also claims that

[1] By virtue of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 1983, the FDIC has taken over the assets and liabilities of FSLIC. For simplicity's sake, however, FSLIC has been retained as the named plaintiff in this matter.

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even if the settlement was intended to settle all outstanding claims, FSLIC specifically reserved its right to file suit against Peter Duffy ("Duffy") and against New England, as Duffy's insurer, in an effort to collect Duffy's virile share of the $35 million judgment entered in the above captioned matter against Mmahat & Duffy.[2] For the following reasons, FSLIC's motion to enforce settlement is HEREBY DENIED.

I. BACKGROUND

In November, 1986, FSLIC filed this action as receiver of Gulf Federal Savings Bank ("Gulf") to recover damages incurred by Gulf as a result of alleged wrongful acts by Gulf's former officers, directors and lawyers. FSLIC's claims against the officers, directors and their insurers were settled prior to trial. Certain of FSLIC's legal malpractice claims, denominated by the parties as "Phase I Claims," against Gulf's former attorneys, the firm of Mmahat & Duffy and John Mmahat individually, as well as New England, their professional liability insurer, proceeded to trial on November 10, 1988.[3] On December 9, 1988, the jury returned a verdict in favor of FSLIC in the amount of $35 million. On December 14, 1988, the parties entered

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[2] FSLIC has in fact filed a lawsuit against Peter Duffy and against New England as Duffy's insurer. Said case is captioned as follows: *Federal Deposit Insurance Corporation as Manager of the Federal Savings & Loan Insurance Corporation Resolution Fund v. Peter E. Duffy and New England Insurance Company,* CA 89-4947 "A"(2).

[3] FSLIC's malpractice claims against Mmahat & Duffy and John Mmahat were separated into two categories. These categories were labeled "Phase I" and "'Phase II." The claims in "Phase I" arose out of alleged malpractice and breach of fiduciary duty by Mmahat and his firm with respect to their advice regarding federal lending limits set forth in the loans to one borrower regulation. The claims in "Phase II" arose out of alleged malpractice by Mmahat and his firm with respect to their handling of three specific loans on behalf of Gulf.

on the record a settlement with regard to FSLIC's "Phase II Claims." Pursuant to this settlement, New England was to pay FSLIC $225,000.00.

In accordance with the above settlement, on June 30, 1989, New England tendered a check to FSLIC in the amount of $225,000.00, with the stipulation that said check not be negotiated until a final settlement agreement had been executed. Shortly thereafter, counsel for FSLIC responded, stating "I am holding" the check pending all parties' agreement regarding the settlement of this matter. (See July 6, 1989 correspondence attached hereto as Exhibit A.) Although the parties have still failed to consummate their settlement, FSLIC's counsel continues to hold New England's $225,000.00 settlement check.

II. SETTLEMENT INCLUDED ONLY THREE SPECIFIC MALPRACTICE CLAIMS

Contrary to FSLIC, New England argues that the settlement of "Phase II" included all matters involved in the case other than those matters specifically set forth in "Phase I." Stated differently, New England takes the position that all Phase II malpractice claims have been settled as opposed to only the three specified malpractice claims. A review of the pre-trial order as well as the attached trial transcript (Exhibit B) in this matter illustrates that New England's position is correct.

As pointed out in New England's memorandum, FSLIC's November 21, 1986 complaint encompassed a myriad of malpractice claims. However, following a lengthy discovery process, FSLIC's claims were narrowed

down considerably.[4] Finally, in the October 28, 1988 pre-trial order, FSLIC, as required by this Court's pre-trial notice, listed the actual claims which it sought to bring against defendants. FSLIC specifically set forth that it had "four legal malpractice claims" pending. FSLIC enumerated these claims as follows: "(i) ***Loans-To-One Borrower Advice;*** (ii) ***Loan to John Elms;*** (iii) ***Loan to Chateau LeGrand, Inc.;*** and (iv) ***Charles Sequra***."

FSLIC now seeks to reserve its right to file another suit regarding claims not included in its pre-trial order. However, it was FSLIC, not defendants, which limited its cause of action to these four malpractice claims. Due to Federal notice pleading and the Federal Rules of Civil Procedure, the limits of the complaint's triable issues are determined by the pre-trial order. If FSLIC sought to bring additional claims, it should have listed those additional claims in the pre-trial order. Failing to do so, FSLIC is now precluded from bringing such claims. *See generally Trinity Carton Co. v. Falstaff Brewing Corp.*, 767 F.2d 184, 192 n.13 (5th Cir. 1985), *cert. denied*, 475 U.S. 1017, 106 S.Ct. 1202, 89 L. Ed.2d 315 (1986).

Further, as illustrated by the below-quoted passage from the transcript, it was clearly the intent and understanding of all parties that all remaining malpractice claims, or the entirety of "Phase II," were being settled pursuant to the December 14, 1988 agreement.

> THE COURT: As I understand it, generally what we have been referring to as the second phase of

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[4] FSLIC voluntarily limited all of its "Phase II" claims to defendants' handling of three specific loans in order to expedite the proceedings as it was obvious, as a practical matter, that it could not recover any sums in excess of the loss incurred in connection with the pertinent three loans.

this case, which is the "traditional" malpractice claims, have been settled, is that correct?

MR. GULOTTA [counsel for FSLIC]: That's correct.

(Transcript p. 1658-59.)

III. RESERVATION OF RIGHT TO BRING ACTION AGAINST PETER DUFFY AND HIS INSURER

FSLIC relies upon one isolated passage in the trial transcript to support its argument that it reserved its right to file suit against Peter Duffy and against New England as Duffy's insurer. Specifically, counsel for FSLIC stated as follows:

> The FSLIC will reserve and maintain its rights under the jury verdict and any judgment to be rendered in its favor on "Phase I" which consists, of course, of the claims for malpractice and breach of fiduciary duty in connection with the loan-to-one borrower violations. [Underlining ours.]

(Transcript p. 1659.) However, upon review of the trial transcript as a whole, it is clear that the above language was meant to reserve FSLIC's right under the jury verdict for appeal purposes only.

First, the transcript reflects that FSLIC failed to reserve any claims it may have had against Peter Duffy or against New England as Duffy's insurer. In fact, had FSLIC attempted to reserve any such rights against these parties, neither counsel for Duffy nor counsel for New England, both of whom were present at this December 14, 1988 settlement, would have concurred in such a settlement. Yet, both parties were specifically asked if they con-

curred in the agreement and both responded affirmatively. (See attached transcript at p. 1662.)

Second, the transcript shows that the Court specifically enumerated all issues or claims which remained for the Court to decide and asked each attorney if he agreed that these were the only remaining disputes. Had FSLIC had any thought of proceeding against Duffy personally, it should have made such a statement at this juncture.

> THE COURT: ... As the court understands it, in order to conclude this case the following claims and/or defenses must be decided: Whether or not John Mmahat and/or New England have any claim against American Casualty Company. Included in those claims would be whether or not John Mmahat is due any fee for his personal time involved in defending this action, whether or not John Mmahat has any claim for bad faith and third whether the policy exclusions by their very terms afford no coverage whatsoever. Fourth, whether American Casualty Company was put on proper notice.

(Transcript p. 1666, lines 3-13.)

> THE COURT ... The next issue for the Court to determine and which it hads not yet determined is whether the policy exclusions of New England are such that it has no liability for payment of the amount awarded in "Phase I" of this suit, "Phase I" being the malpractice for violation of the loan-to-one borrower regulation.
>
> And the third matter that the Court has to resolve is whether or not John Mmahat by reason

> of the evidence adduced at this trial is entitled to obtain a discharge in bankruptcy. The Court meant to include in the claim of Mr. Mmahat to be reimbursed for his personal time involved in defense also the issue as to whether or not he is entitled to be reimbursed from American Casualty the costs and fees paid by New England which he incurred in defense of these proceedings and also whether New England is entitled to reimbursement of those costs and fees.

(Transcript p. 1667, lines 11-25.)

> THE COURT: Now, I'm going to ask each attorney to concur that those are the only issues remaining in the case and that, thus, it would be appropriate for me to dismiss the jury that has been impaneled to hear this case. Let each of you stand up and state your name and your assent.

(Transcript p. 1668, lines 1-5.)

> MR. GULOTTA: James Gulotta on behalf of plaintiff, FSLIC. *I concur those are the only remaining issues, and the jury may be dismissed.*

If it had been revealed to the Court that FSLIC intended to reserve any right with respect to any claim it might have against Peter Duffy or his insurer, the Court would never have entered a final judgment based on such. It is ludicrous to suggest that this Court, with all parties present and ready to proceed and after having cleared its docket to go forward with this case and considering all the pretrial work involved, would have agreed to enter a judgment amounting to a partial compromise. If FSLIC intended to preserve such a claim, good faith required it to have clearly stated such an intent to the Court. It is also obvious

that New England, which was also prepared to go forward, would not have entered into this settlement if it had felt that it would be required to defend another action brought against itself and Duffy personally.

As indicated above, two of the issues specifically reserved for the Court to decide was whether or not coverage for the jury's $35 million verdict was afforded under the New England policy in light of the policy's dishonesty exclusions;[5] and whether or not the jury's $35 million verdict was dischargeable in bankruptcy proceedings filed by Mmahat. On December 28, 1988, the Court ruled that the New England policy did not provide coverage for the jury's verdict, and that the jury's verdict was nondischargeable in bankruptcy.

In light of the above rulings, it becomes obvious why FSLIC now attempts to expand its settlement reservation. The December 14, 1988 settlement was entered into and put on the record prior to the Court's December 28, 1988 rulings regarding non-dischargeability and insurance coverage. Now that FSLIC is unhappy with the results of the ruling on coverage, it appears that it has microscopically examined the transcript in order to attempt to ascertain if it could now find some way to exculpate itself from what everyone thought was a good faith agreement. If there was anything ambiguous about Mr. Gulotta's representation to the Court regarding the terms of the settlement, it

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[5] The New England policy provided, in petinent part, as follows:

> The policy shall not indemnify the Insured for any damages or claim expenses as the result of any claim:
>
> A - that results in a final adjudication that any Insured has committed a dishonest, fraudulent or malicious act, error, ommission or personal injury with deliberate purpose and intent.

should be interpreted against him as he dictated the terms in the record. To say the least as an officer of the Court, he had an obligation, when asked by the Court (as quoted above) if the enumerated issues "were the only issues remaining in the case ...," to state something like, 'No, FSLIC's claims against Mr. Duffy personally and against New England Insurance Company as Mr. Duffy's insurer, remain unresolved." Not to have made such a statement and then to proceed to attempt to take advantage of some ambiguous language in a hastily proposed statement prepared by him for the record amounts to more than a failure to be candid. Viewed in the most charitable light, it constitutes (unless this action was dictated by house counsel for plaintiff) a level of conduct far below that which this Court is entitled to expect from its bar.

It was the opinion of this Court at the time this settlement was entered into, and it remains the opinion of this Court, that FSLIC's reservation of rights with respect to the "Phase I" jury verdict was intended for appellate purposes only, and all other claims against New England and Duffy were settled. Had FSLIC intended to bring an additional claim against Peter Duffy, it had ample opportunity to do so over the two year course of this litigation and long prior to the Court's aforesaid adverse ruling on other issues and after a compromise agreement had been entered.

IV. PROPER DISPOSITION OF SETTLEMENT FUNDS

Finally, FSLIC complains in its memorandum that it "has *still* not been paid [by New England]. [Emphasis in original.]" However, such a representation is, at the very least, misleading.

As stated earlier, New England honored its

obligation under the settlement when, on June 30, 1989, it sent a check to FSLIC in the amount of $225,000.00, along with a proposed settlement agreement. As is normal, New England requested that FSLIC wait until the settlement agreement had been executed before negotiating said check. FSLIC, upon review of New England's proposed settlement and as evidenced by FSLIC's response to New England's settlement proposal, was obviously aware that there was disagreement with regard to the settlement provisions. However, rather than moving to deposit the check into the Registry of the Court with reservation or returning the check to FSLIC, FSLIC simply "held" the funds and no interest is being earned on such.

V. CONCLUSION

For the above reasons, IT IS HEREBY ORDERED that FSLIC's motion to enforce settlement is DENIED. The Court reserves the right of defendant New England to file a motion to recover the costs it incurred in defending against FSLIC's motion to enforce settlement.

IT IS FURTHER ORDERED that Civil Action 89-4947 "A"(2), *Federal Deposit Insurance Corp., Etc. v. Peter Duffy, et al,* is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that the Clerk of Court ENTER the attached Judgment in this matter.

IT IS FURTHER ORDERED that FSLIC either accept New England's tendered settlement check as full payment of the settlement provided herein or forthwith return said check to New England and New England may consummate such settlement by depositing the sum of $225,000 in the Registry of this Court.

New Orleans, Louisiana, this 19th day of December, 1989.

/s/ Charles Schwartz, Jr.

UNITED STATES DISTRICT JUDGE

STONE, PIGMAN, WALTHER,
WITTMANN & HUTCHINSON

Counsellors at Law
546 Carondelet Street
New Orleans, Louisiana 70130-3588
(504) 581-3200
Telecopier (504) 561-3361
Telex 161708NLN

July 6, 1989

35-455

Mr. John V. Baus, Jr.
Blue, Williams & Buckley
3421 North Causeway Boulevard
Ninth Floor
Metairie, Louisiana 70002

RE: FSLIC v. Mmahat, et al.;
C.A. NO. 86-5160-A

Dear John:

Thank you for your letter of June 30, 1989 and enclosures. Pursuant to your request, I am holding New England's partial settlement check in the amount of $225,000, pending conclusion of the partial settlement.

The following are my comments to the Partial Settlement and Release Agreement as redrafted by you and submitted to me with your letter of June 30, 1989:

EXHIBIT
A

Section References and Comments

1.1(d) & (e) At this portion of the agreement, I notice you added John A. Mmahat and Mmahat & Duffy as parties to the agreement. In principle, I have no objection to their being included as parties.

1.2 Here, you added some additional categories of persons bound by the agreement. For example, you included "subrogees" and "indemnitees." In principle, I have no objection to the added categories of persons to be bound by the agreement.

2.3 In the sentence leading into this section, you added the following underscored phrase:

> 2.3 In the consolidated cases, the FSLIC, *in its own behalf and on behalf of Gulf and certain of its stockholders,* made the following claims, among others:

I object to the addition of the underscored phrase. The capacity in which FSLIC brought this action is more extensive than what is indicated in the phrase you added. Although we could draft a correct description of the FSLIC's capacity, it would end up being very long and involved. I do not believe that a description of all of FSLIC's capacities is required at this point in the agreement. Therefore, I do not think it is worthwhile to take the trouble to include an accurate and extensive description of the FSLIC's capacities. That being the case, I especially see no need for a partial and misleading description of FSLIC's capacities. I suggest that we delete any reference to FSLIC's capacities at this point in the agreement and return the text to the way it was originally.

2.3(a) I notice that you deleted the definitions of the traditional malpractice claims in Sections 2.3(a)(i) through (iii). In principle, I have no objection to the change you suggest at this point in the agreement.

2.3(b) In what is now Section 2.3(b) (formerly 2.3(c) of my draft of 3/30/89), you included Mmahat & Duffy as a party against whom FSLIC sought a determination of nondischargeability. That is incorrect. To my knowledge, Mmahat & Duffy has not sought protection of the bankruptcy laws. And, in any case, FSLIC has not filed a petition to determine that the debt owed to it by Mmahat & Duffy is nondischargeable.

2.4 In keeping with the deletion of the description of the traditional malpractice claims in 2.3(a) above, I notice that you deleted the definition of the traditional malpractice claims from this section of the agreement. In principle, I do not object to the deletion.

2.7 I notice that you changed some of the recitals in this section. In doing so, I think you made a mistake regarding the date on which the trial began. As I recall, the trial started on November 16, 1988, instead of November 10, 1988 as you have it. Also, you added a clause at the very end of this section indicating that the written settlement is designed to supersede the settlement that was read into the record in court. As there are a number of provisions in the settlement agreement drafted by you that were not part of the settlement agreement read into the record in court and as FSLIC is not willing to agree now to some of the provisions included in your draft (*see* discussion of Sections 4.4, 5 and 6 *infra*), I am not willing to concede that the written settlement agreement as drafted by you supersedes what was read into the court record.

4.4 You changed the heading of this section by adding the modifier "Partial" so that the reservation is now a partial reservation. I note that the primary effect of the deletion from my draft of 3/30/89 of the definitions of the traditional malpractice claims and the modification of the release language in Section 4.1 is to make the release given by FSLIC a release of all claims against New England, except for those reserved in 4.4. Even though the approach you have taken is akin to the tail wagging the dog, I understand why you've chosen to make the alteration you've requested. In principle, I do not object to the approach that you have taken, as long as the reservation provision in 4.4 accurately preserves FSLIC's claims in the ongoing litigation that continues between our clients. The addition of the modifier "partial" to the heading of Section 4.4. is inaccurate and should be deleted. Also, in Section 4.4 you deleted FSLIC's reservation of its claims against John A. Mmahat arising out of the nondischargeability determination, which formerly was provided for in Section 4.4(e) of the 3/30/89 draft that I sent you. Naturally, the reservation in 4.4(e) of the 3/30/89 draft must be restored to Section 4.4 of your draft. Finally, I would like to add another subsection to 4.4 reserving FSLIC's rights against Peter Duffy and New England for liability insurance coverage of Peter Duffy for any liability he has in his capacity as a partner in Mmahat & Duffy.

5.0 *Indemnification and Hold Harmless.*

At the time FSLIC made the partial settlement agreement, it made no agreement to idemnify New England, John Mmahat, Mmahat & Duffy or Commonwealth. As the agreement that we are negotiating is only a partial settlement agreement and as there remain between our respective clients substantial claims that are still being litigated, it is difficult for me to understand how

an indemnification provision would work under the circumstances present in this case. It is also difficult for me to understand how such an indemnification provision would benefit your client in this case. Therefore, even if FSLIC were willing to modify the settlement agreement read into the court record by entertaining an indemnification provision (which FSLIC is not willing to do), this would not be an appropriate time or situation to make such an agreement. Therefore, I object to the inclusion in the settlement agreement of the indemnification and hold harmless provision that you have drafted in Section 5 of the June 30, 1989 draft with which you provided me.

6.0 *Dismissal of Claims.*

I notice that in this portion of the settlement agreement you included a provision for dismissal by FSLIC of the claims released in the partial settlement agreement. Once again, FSLIC made no such agreement at the time the settlement was read into the record. Notwithstanding that, however, there is the conceptual difficulty of entering a partial dismissal order while litigation is continuing. Moreover, there is the difficulty of dismissing the claims as you have described them in 4.1 as consisting of all claims other than those that are reserved. Finally, the release given by FSLIC to your client in the partial settlement agreement is sufficient protection for your client. There is no need to enter any further partial orders of dismissal in the case while the litigation is continuing. Ultimately, there will be a final disposition of all of the litigation in the case, at which time appropriate judgments will be entered by the appellate or district court or both on their own motions or on the joint motions of the parties. Therefore, I suggest that the only motion to dismiss that be entered is the one disposing of the claims against Commonwealth.

As you can see from the preceding discussion, I have no objection to the primary purpose of your redraft. I do have substantial objections to the inclusion in the agreement of an indemnification provison and a dismissal order pertaining to the claims of FSLIC that are being released.

Please call me at your earliest convenience so that we can address these issues that are still outstanding and move forward with the partial settlement.

Sincerely,

James C. Gulotta, Jr.

JCG/lmb
cc: Mr. Florian Frederick Chess (w/enc.)
Mr. Ted A. Price (w/enc.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUSIANA
NEW ORLEANS, LOUISIANA

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, IN ITS CORPORATE CAPACITY AS AN INSTRUMENTALITY OF THE UNITED STATES	:	CIVIL ACTION
	:	NO. 86-5160
versus	:	
JOHN A. MMAHAT, ET AL	:	SECTION "A"

APPEARANCES:

Phillip A. Wittman James C. Gulotta, Jr. Sarah Vance Charles L. Stern, Jr.	Stone, Pigman, Walther, Wittmann & Hutchinson 546 Carondelet Street New Orleans, Louisiana 70130 Attorneys for Plaintiff
Richard Simmons, Jr.	3121 21st Street Metairie, Louisiana Attorney for John Mmahat
Michael Ellis	3500 North Hullen Street Metairie, Louisiana Attorney for John Mmahat

C. Alan Hennesy	Lemle, Kelleher, Kohlmeyer, Dennery, Hunley, Moss & Frilot 601 Poydras Street New Orleans, Louisiana 70130 Attorney for James B. Cobb and Elva Winters
Richard Tomeny	212 Veterans Memorial Blvd. Metairie, Louisiana Attorney for Rod Jordy
Frank DeSalvo	725 Girod Streeet New Orleans, Louisiana 70130 Attorney for David Resha

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(VOLUME X)

Philip A. Gattuso	56 Westbank Expressway Gretna, Louisiana 70053 Attorney for Merrol Capdeville
Edward Nicholas Marianne Pensa	Galloway, Johnson & Tompkins One Shell Square, Room 4040 New Orleans, Louisiana 70139 Attorneys for American Casualty Insurance Company
Forrest J. Hinton Steve Wright	McGlinchey, Stafford, Mintz, Cellini & Lang 643 Magazine Street New Orleans, Louisiana 70130 Attorneys for Mount Holly Insurance Company

Donald A. Hammett — 3421 North Causeway Boulevard
Metairie, Louisiana
Attorney for New England Insurance Company

REPORTER'S NOTE: David Lichtenstein, William Lucas and Joseph Mmahat, Jr. represent themselves.

. . . . . .

(Transcript of proceedings held in the above-entitled matter on Wednesday, December 14, 1988, in the Courtroom, United States Courthouse, 500 Camp Street, New Orleans, Louisiana; HONORABLE CHARLES SCHWARTZ, JR., District Judge, presiding.)

PROCEEDINGS

MORNING SESSION

(Wednesday, December 14, 1988)

(Court convened at 9:25 a.m.)

THE COURT: Let's put the appearances on the record.

MR. GULOTTA: James Gulotta, Jr., Charles Stern and Rodney Solberger for plaintiff, FSLIC.

MR. SIMMONS: Rick Simmons for Mr. John Mmahat and Mmahat & Duffy.

MR. ELLIS: Michael Ellis, co-Counsel with Mr. Simmons for Mmahat & Duffy.

MR. HAMMETT: Donald Hammett representing New England Insurance Company.

THE COURT: Everybody here. Let's state your appearance.

MR. NICHOLAS: Edward Nicholas for American Casualty Co.

MR. HINTON: Forrest Hinton for Mount Holly Insurance Co.

MR. STEWART: John Stewart for Continental Casualty Co. and Robert H. Marie and Rarton Pender as trustees, bankrupt, of multi-bankruptcy estate.

MR. PRICE: Roy Price for Commonwealth Land Title Insurance Company.

THE COURT: As I understand it, generally what we have been referring to as the second phase of this case, which is the "traditional" malpractice claims have been settled, is that correct?

MR. GULOTTA: That's correct.

THE COURT: Let's put that settlement on the record.

MR. GULOTTA: The settlement of phase 2 of the litigation consists of FSLIC's claims against Mmahat & Duffy and New England for malpractice in connection with 1) title opinions issued by Mmahat & Duffy on the John Em's loan, 2) the special warranty deed prepared in connection with the sale of the Chateau Legrand project and 3) the lack of title examination on the Segura loan consisting of the following terms in connection with that settlement: The FSLIC will settle and grant release to John Mmahat, Mmahat & Duffy and New England for the preceding claims in return for a payment of, total amount of $250,000, which is made up of $225,000 from New England and $25,000 from the third party defendant that we brought into the action by New England, that third party defendant being Continental Land Title Insurance Company.

The FSLIC will reserve and maintain its rights under the jury verdict and any judgment to be rendered in its favor on phase 1 which consists, of course, of the claims for malpractice and breach of fiduciary duty in connection with the loan-to-one borrower violations.

New England, Mmahat & Duffy and John Mmahat will reserve and maintain all their rights and defenses in connection with the jury verdict and any judgment rendered against them on phase 1.

New England will also reserve its rights regarding its policy limitations so that in connection with any judgment rendered against it on phase 1 either by this Court or any higher Court New England reserves the right to claim that settlement payment made to conclude phase 2 is to be credited against the amount, if any, in which it is cast in judgment on phase 1.

FSLIC, of course, reserves its right to contend otherwise regarding the effect, if any, of the settlement payment to conclude phase 2 on any judgment in its favor on phase 1. Accordingly, if necessary the effect of the phase 2 settlement payment on any phase 1 judgment will be submitted to this Court or a higher Court for decision.

New England will release and dismiss its third party demand against Commonwealth Land Title Insurance Company. Is there anything else?

THE COURT: I thought they would be given a credit of $250,000?

MR. GULOTTA: They will, Your Honor. If your decision that the loan-to-one borrower is not limited to $1 million, then that is, there is $2 million of coverage for loan-to-one borrower. We all agree that New England will get $250,000 credit. The only area where we are in disagreement is if there is an appeal and the 5th Circuit decides that the loan-to-one borrower is limited to one million. New England, I think, will contend or they want the right to reserve to contend that $250,000 is credited to that one

million. We would say, of course, that the traditional malpractice, the $250,000 settlement is separate from the loan-to-one borrower, and we would be entitled to a full one million in that event. I think that's the only disagreement that —

MR HAMMETT: I think that's correct. We have 2 positions on our limits: 1) everything is a million including both phases of the case, and then secondly it could be divided, and as long as we reserve our rights in that regard it's fine

There is one nickel I got to pick up and that is we also have a $5,000 deductible that we actually afford coverage over 5,000.

MR. SIMMONS: Judge, to clarify the way the settlement proposal was presented —

THE COURT: Well, is it correct?

MR. SIMMONS: It's correct, I think. I want to avoid a $25,000 argument later from the standpoint of the 225 coming from New England and 25 from Commonwealth. Commonwealth was not brought in by FSLIC or Pelican in the Mississippi lawsuit but they were aware of the Mississippi lawsuit. When it was settled, it did not include Commonwealth; New England brought in Commonwealth.

THE COURT; Well, first let me see if everyone agrees.

MR. SIMMONS: 250 —

MR. GULOTTA: Is the correct —

MR. SIMMONS: I will use the word 250 on behalf of New England, but 25 will come from Commonwealth.

THE COURT: Well, I will ask Commonwealth. Mr. Price, Commonwealth going to pay 25,000?

MR. PRICE: That is correct, Your Honor.

THE COURT: Then you got no problem. You have authority for your client to make that?

MR. PRICE: I have authority from my client.

THE COURT: Was the settlement set out correctly?

MR. PRICE: That is correct, Your Honor.

MR. SIMMONS: I think you want assurance there will be no other FSLIC lawsuit against Commonwealth.

MR. PRICE: That's correct.

MR. GULOTTA: Commonwealth has that assurance, Your Honor.

THE COURT: You have authority for your client?

MR. GULOTTA: Yes, Your Honor.

THE COURT: Mr. Simmons, you have authority from your client to enter into this settlement?

MR. SIMMONS: Yes, I do, Your Honor.

THE COURT: Mr. Hammett, you have authority?

MR. HAMMETT: Yes, sir.

THE COURT: Does this settlement affect anybody else here? Mr. Ellis, you are a part of Mr. Simmons, correct?

MR. ELLIS: Mr. Duffy concurs.

THE COURT: Mr. Duffy concurs in settlement. Is anybody else affected by the settlement?

(No response from Counsel.)

THE COURT: All right, the Court will accept that settlement and make it a part of any judgment rendered herein.

MR. GULOTTA: Thank you, Your Honor.

THE COURT: We have got some other matters?

MR. GULOTTA: Yes, if I may, Your Honor, I invited John Stewart, who represents the Mouledoux bankruptcy estates and Continental Casualty Insurance Company to participate today. If you recall we agreed to a settlement with those defendants prior to trial. We have exchanged settlement documents. The FSLIC has signed the settlement agreement; Continental has not yet, but I thought he would want to get that on the record.

THE COURT; Let's put it on the record. State that settlement and put it on the record.

MR. GULOTTA: In connection with the settlement of the FSLIC's claims against the bankruptcy estates of Richard Mouledoux, Richard Mouledoux Architectural Corporation and Continental Casualty Company, the parties have agreed on the following terms; In return for pay-

ment by Continental Casualty Company to FSLIC of $550,000, FSLIC releases and dismisses its claims against the bankruptcy estate of Richard C. Mouledoux and bankruptcy estate of the Richard Mouledoux Architectural Corporation and will dismiss its claims against Continental Casualty Company. The FSLIC reserves its right against all other parties to the litigation including most importantly at this point FSLIC's right under the jury verdict and any judgment in its favor against John Mmahat, Mmahat & Duffy and New England.

The FSLIC will indemnify Continental from any claims arising out continued proceedings by the FSLIC in the case against remaining defendants to the litigation. Continental and the bankruptcy estates of Mr. Mouledoux and the Mouledoux Architectural Corporation will release in some cases and in other cases assign to the FSLIC their third party demands against the third party defendants that they have brought into the case. And as a result of that, all such third party demands by Continental and the bankruptcy estates of Mouledoux and the Mouledoux Architectural Corporation will be disposed of. Continental, the Mouledoux bankruptcy estate and the Mouledoux Architectural Corporation will release the FSLIC in connection with these consolidated actions. The settlement among the FSLIC, Continental Casualty and Mouledoux bankruptcy estate and Mouledoux Architectural Corporation estate will have to be confirmed upon bankruptcy approval issued through bankruptcy proceedings. But inasmuch as the settlement involved no payment by the bankruptcy estate and complete release of the bankruptcy estate of enormous liability carried in those bankruptcy estates, bankruptcy court approval is certain.

MR. HINTON: Those are the specifics of the settlement. The only thing that is really holding things up so to

speak is the contacting Mr. Pender, who is one of the bankruptcy trustees. I have authority from Continental Casualty Company and authority from Robert L. Marie to commit to the settlement. The funds are all going to be paid by Continental Casualty Company. I do not anticipate any problem at all in obtaining Mr. Pender's approval. He is, unfortunately, out of the city right now and that is the only thing that is holding up the paperwork.

THE COURT: But that's just a matter of getting hold of him.

MR. HINTON: I think so, Your Honor.

THE COURT: All right.

MR. GULOTTA: I think that concludes —

THE COURT: Can you reach him by telephone?

MR. HINTON: Your Honor, I can't reach him at — every time I call the office all I receive is a recording, and I can't get any response to telephone calls at home.

THE COURT: Okay.

MR. HINTON: So I'm not sure where he is.

THE COURT: All right. Let's go off the record for a moment.

(Off-the-record discussion held at 9:58 a.m., and then the Court reconvened on the record at 10 a.m.)

THE COURT: Let's go back on the record. As the Court understands it, in order to conclude this case the following claims and/or defenses must be decided: Whether or not John Mmahat and/or New England have any claim against American Casualty Company. Included in those claims would be whether or not John Mmahat is due any fee for his personal time involved in defending this action, whether or not John Mmahat has any claim for bad faith and third whether the policy exclusions by their very terms afford no coverage whatsoever. Fourth, whether American Casualty Company was put on proper notice.

Insofar as the fourth and fifth contentions are concerned the parties agree first that whether or not notice was given is to be determined by the Court based upon the evidence in the record including all letters written — I'm talking about the third and fourth claims; I only counted 4 claims, not 5. And the deposition of Pat Ardis. Is there anything else I have to consider in connection with that?

MR. SIMMONS: Your Honor, there are several attachments to his deposition.

THE COURT: And all attachments to his deposition.

MR. SIMMONS: And maybe demand letters from Mr. Mmahat to CNA but that would be it.

THE COURT: In other words, on the notice issue —

MR. SIMMONS: Those letters may all be attached to the deposition. To the extent they are not, I will add those.

THE COURT: It being understood that the letters referring to above were all attached to the deposition.

As to the coverage exclusions, the parties agree that the evidence heretofore taken in this case is sufficient both from plaintiff, defendants' and cross claimants' and third party claimants' point of view is sufficient for the Court to decide that issue.

The next issue for the Court to determine and which it has not yet determined is whether the policy exclusions of New England are such that it has no liability for payment of the amount awarded in phase 1 of this suit, phase 1 being the malpractice for violation of the loan-to-one borrower regulation.

And the third matter that the Court has to resolve is whether or not John Mmahat by reason of the evidence adduced at this trial is entitled to obtain a discharge in bankruptcy. The Court meant to include in the claim of Mr. Mmahat to be reimbursed for his personal time involved in defense also the issue as to whether or not he is entitled to be reimbursed from American Casualty the costs and fees paid by New England which he incurred in defense of these proceedings and also whether New England is entitled to reimbursement of those costs and fees.

Now, I'm going to ask each attorney to concur that those are the only issues remaining in the case and that, thus, it would be appropriate for me to dismiss the jury that has been empaneled to hear this case. Let's each of you stand up and state your name and your assent.

MR. GULOTTA: James Gulotta on behalf of plaintiff, FSLIC. I concur those are the only remaining issues, and the jury may be dismissed.

MR. HAMMETT: Donald Hammett for New England. Your Honor, I agree.

MR. SIMMONS: I will use the word 250 on behalf of New England, but 25 will come from Commonwealth.

THE COURT: Well, I will ask Commonwealth. Mr. Price, Commonwealth going to pay 25,000?

MR. PRICE: That is correct, Your Honor.

THE COURT: Then you got no problem. You have authority for your client to make that?

MR. PRICE: I have authority from my client.

THE COURT: Was the settlement set out correctly?

MR. PRICE: That is correct, Your Honor.

MR. SIMMONS: I think you want assurance there will be no other FSLIC lawsuit against Commonwealth.

MR. PRICE: That's correct.

MR. GULOTTA: Commonwealth has that assurance, Your Honor.

THE COURT: You have authority for your client?

MR. GULOTTA: Yes, Your Honor.

THE COURT: Mr. Simmons, you have authority from your client to enter into this settlement?

MR. SIMMONS: Yes, I do, Your Honor.

THE COURT: Mr. Hammett, you have authority?

MR. HAMMETT: Yes, sir.

MR. PRICE: Roy Price on behalf of Commonwealth. We concur.

THE COURT: All right, Gentlemen, thank you all very much.

MR. SIMMONS: Let me state for the record that in connection with the deposition of — we are providing the Court a copy of Mr. Ardis' deposition of October 6, 1988, with various letters attached to the deposition, 6 exhibits, 6 exhibits which reflect as Exhibit 2739, 2740, 2741, 2742, 2744 and 3400 from the trial exhibits. I don't know if there is a 43 missing, but we will determine that and if it is we will supplement it. Exhibit 2743 is tab 865, Exhibit 2743.

(Settlement with reference to phase 2 concluded.)

REPORTER'S CERTIFICATE

The undersigned certifies, in his capacity of Official Court Reporter for the United States District Court, Eastern District of Louisiana, the foregoing to be a true and correct transcription of his Stenograph notes taken during the proceedings in the above-numbered and titled case on the 16th, 17th, 18th, 21st and 23rd days of November, 1988, and on the 5th, 6th 7th, 9th and 14th days of December, 1988.

New Orleans, Louisiana, the 5th day of July, 1989.

/s/ David A. Zarek

DAVID A. ZAREK
Official Court Reporter

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 90-3123

FILED
JUN 25 1992

FEDERAL DEPOSIT INSURANCE CORPORATION, as Manager of the FSLIC Resolution Fund substituted for Federal Savings & Loan Insurance Corporation,

Plaintiff-Appellant,

versus

JOHN A. MMAHAT, ET AL.,

Defendants-Appellees.

No. 90-3130

FEDERAL DEPOSIT INSURANCE CORPORATION, as Manager of the Federal Savings & Loan Insurance Corporation Resolution Fund,

Plaintiff-Appellant,

versus

PETER E. DUFFY and NEW ENGLAND INSURANCE COMPANY,

Defendants-Appellees.

Appeals from the United States District Court for the Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 05/20/92, 5 Cir., 198__, ____F.2d ____)

(JUNE 25, 1992)

Before KING, JOHNSON and DAVIS, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active ~~service of~~ this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

/s/ Carolyn Denun King
UNITED STATES CIRCUIT JUDGE

APPENDIX F
STATUTORY MATERIALS

1. Federal Rule of Civil Procedure 52(a) provides in part that:

> ...Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

2. Federal Rule of Civil Procedure 16(e) regarding pretrial orders provides that:

> After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

3. Federal Rule of Civil Procedure 16(f) provides in part:

SANCTIONS. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the Judge, upon motion or the Judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D)....

4. Sanctions permitted under Rule 37(b)(2)(C) include:

> ...An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

5. Federal Rule of Civil Procedure 19(a) requires the joinder of persons needed for just adjudication when:

> ...(1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations....

6. Louisiana Civil Code article 2817 provides for joint, not solidary liability on the part of partners of a partnership:

> A partnership as principal obligor is primarily liable for its debts. A partner is bound for his virile share of the debts of the partnership but may plead discussion of the assets of the partnership.

7. Louisiana Code of Civil Procedure article 643 provides:

> All joint obligees are necessary parties to an action to enforce a joint right, and all joint obligors are necessary parties to an action to enforce a joint obligation.

> One or more solidary obligees may sue to enforce a solidary right, and one or more solidary obligors may be sued to enforce a solidary obligation, without the necessity of joining all the others in the action.

8. Louisiana Code of Civil Procedure article 737 provides in part that:

> The partners of an existing partnership may not be sued on a partnership obligation unless the partnership is joined as a defendant.

9. Louisiana Civil Code article 3071, regarding settlements, provides in part:

> A *transaction* or *compromise* is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing.

10. Louisiana Civil Code article 3078, regarding settlements, provides in part:

> Transactions have, between the interested parties, a force equal to the authority of things adjudged...

11. Louisiana Civil Code article 3079, regarding settlements, provides in part:

> A transaction may be rescinded notwithstanding, whenever there exists an error in the person or on the matter in dispute. It may likewise be rescinded in the cases where there exists fraud or violence.

12. Louisiana Civil Code article 3083, regarding settlements, provides in part:

> When parties have compromised generally on all the differences, which they might have had with one another, the titles which they then know nothing of and which were afterwards discovered, are not a cause of rescinding the transaction....

13. Louisiana Civil Code article 2053, regarding contractual interpretation, provides:

> A doubtful provision must be interpreted in light of the nature of the contract, equity, usages, the conduct of the parties before and after the formation of the contract, and of other contracts of a like nature between the same parties.

14. The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

> ...nor shall any State deprive any person of life, liberty or property, without due process of law.